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No. 85-

IN THE

Supreme Court of the United States

October Term, 1985

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
Petitioner,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND UNITED TRANSPORTATION UNION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the Interstate Commerce Commission, when approving a transaction pursuant to 49 U.S.C. §§11343 and 11344, is required to make specific findings of necessity pursuant to 49 U.S.C §11341(a) in order to exempt the carriers participating in the approved transaction from the requirements of the Railway Labor Act (45 U.S.C. §§151-160 (1982))?

LIST OF PARTIES

Brotherhood of Locomotive Engineers and United Transportation Union were petitioners in the case below in the District of Columbia Circuit Court of Appeals.

Interstate Commerce Commission and United States of America were respondents.

Missouri-Kansas-Texas Railroad Company, Denver & Rio Grande Western Railroad Company, Missouri Pacific Railroad Company, and Union Pacific Railroad Company were intervenors in support of the Interstate Commerce Commission.

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BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND UNITED TRANSPORTATION UNION,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Missouri-Kansas-Texas Railroad Company ("MKT") petitions for a writ of certiorari to review an opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit, entered May 3, 1985, as amended July 12, 1985. The court of appeals' judgment vacated two orders of the Interstate Commerce Commission ("ICC" or "Commission") which held that the Commission's approval in Finance Docket No. 30,000 of MKT's trackage rights application rendered the provisions of the Railway Labor Act inapplicable to MKT's decision to operate the trackage rights with its own crews.

I.
OPINION BELOW

The decision of the United States Court of Appeals for the District of Columbia Circuit is reported at 761 F.2d 714 (1985). It appears in the Appendix at A1. The Commission's orders appear in the Appendix at A36 and A40.

II.
JURISDICTION

The judgment of the court of appeals was entered on May 3, 1985, and amended on July 12, 1985. On August 9, 1985, the court of ap-

peals entered orders denying petitions for rehearing and suggestions for rehearing *en banc*. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (1982).

III.
STATUTES INVOLVED

The statutes involved in this proceeding are the Interstate Commerce Act (49 U.S.C. §§11341(a), 11343, 11344 and 11347) and the Railway Labor Act, (45 U.S.C. §§151-160). The pertinent provisions of these statutes are set forth in the Appendix at A55-A63.

IV.
STATEMENT OF THE CASE

This case presents a critical question of the Interstate Commerce Commission's authority under 49 U.S.C. §11341(a) to exempt carriers participating in transactions approved by it under 49 U.S.C. §§11343 and 11344 from other laws, and, as pertinent here, the Railway Labor Act (45 U.S.C. §156). Although it is undisputed that ICC has authority to grant exemptions "as necessary" to let carriers implement approved transactions, a split panel of the District of Columbia Circuit Court of Appeals in this case has ruled that the exemption may be granted *only if* the law in question poses an obstacle to implementation of the transaction, and *only if* ICC makes specific findings of necessity under 49 U.S.C. §11341 justifying the exemption. The court of appeals' decision misapplies decisions of this Court, is inconsistent with ICC's longstanding interpretation of the Interstate Commerce Act, and directly conflicts with decisions of the Sixth and Eighth Circuit Courts of Appeal. The importance of this question of statutory interpretation in this case cannot be overstated. Thousands of shippers face a potential disruption of rail service unless this Court reviews the court of appeals' decision.

On September 15, 1980, Union Pacific Corporation filed an application before the ICC in Finance Docket No. 30,000 seeking ICC approval, *inter alia*, of the consolidation of Union Pacific Railroad Company ("UP") and Missouri Pacific Railroad Company ("MP") pursuant to 49 U.S.C. §§11343 and 11344. On the same date, Union Pacific Corporation and Western Pacific Railroad Company ("WP") filed a similar application. Petitioner Missouri-Kansas-Texas Railroad Company, a railroad operating principally in the states of Kansas, Missouri, Oklahoma, and Texas, opposed the consolidation,

alleging that it would suffer revenue diversions of approximately $23.8 million if the UP-MP-WP merger were approved. It contended that this loss of revenue would impair its ability to provide essential rail service on shipments moving between the Midwest and the Gulf Coast via Kansas City. 366 I.C.C. at 469.[1]

As part of its opposition case, and in an effort to minimize the anticompetitive effects of the UP-MP-WP merger in this market, MKT in January, 1981 filed an application seeking trackage rights over certain MP and UP lines, including the Kansas City-Omaha trackage rights here in issue. MKT proposed to conduct this trackage rights operation *with its own employees.* Proposed Agreement, Sec. 5, MKT Trackage Rights Application, F.D. 30,000 (Sub-No. 25). MKT filed evidence in support of its trackage rights application on February 20, 1981, and ICC held hearings on the application. Both Brotherhood of Locomotive Engineers ("BLE") and United Transportation Union ("UTU") were parties to the UP-MP-WP merger proceeding. Both BLE and UTU submitted evidence relating to MKT's trackage rights proposal. At no time during the evidentiary proceeding did BLE or UTU challenge MKT's right to use its own crews in its proposed trackage rights application or contend that the use of MKT's own crews would violate the Railway Labor Act.

On October 20, 1982, ICC served its decision in the UP-MP-WP merger case. In that order, the Commission observed that its review of the proposed consolidation was governed by 49 U.S.C. §11344, and noted that it was required to approve the transaction if it found the transaction to be "consistent with the public interest." 366 I.C.C. at 483. The interest of carrier employees affected by the proposed transaction was one of the mandatory factors that the Commission was required to consider in making its "public interest" determination. 49 U.S.C. §11344(b)(1)(D). In addition, under 49 U.S.C. §11347, the Commission was required to provide protective conditions for employees affected by the transaction. 366 I.C.C. at 618-619.

In its decision, ICC found that unconditional approval of the UP-MP-WP consolidation would not be in the public interest because,

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[1]The procedural history of these consolidated proceedings is set forth in *Union Pacific Corp., Pacific Rail System, Inc. and Union Pacific R.R.—Control—Missouri Pacific Corp. and Missouri Pacific R.R.*, 366 I.C.C. 459, 471-72, 479, 482 (1982).

inter alia, MKT would suffer an impairment of its ability to provide essential rail service on grain shipments moving from Omaha and other grain gathering points in the Midwest via Kansas City to Gulf Coast points. 366 I.C.C. at 530-531, 547. ICC concluded that those anticompetitive consequences could be "ameliorated" (366 I.C.C. at 531) and in some respects "fully off-set" (366 I.C.C. at 547) by conditioning its approval of the transaction upon the grant of certain of MKT's trackage rights requests.[2] In defining the nature of these conditions, the Commission specifically addressed the crew manning issue in analyzing MKT's trackage rights application. ICC commented on MP's challenge to MKT's estimate of the number of MKT employees required to provide the proposed service. 366 I.C.C. at 566-572. It agreed that MKT most likely had underestimated its crew requirements, but still found that MKT's proposed operation would be entirely feasible with an increased MKT crew complement. 366 I.C.C. at 569. It then approved MKT's trackage rights application *as filed* and imposed protective conditions for the benefit of employees affected by MKT's trackage rights operation. 366 I.C.C. at 621.[3]

UTU (and a number of other labor unions) appealed the Commission's decision approving the UP-MP-WP consolidation, arguing that the level of employee protection imposed on the primary transaction was insufficient to satisfy the provisions of 49 U.S.C. §§11344(b)(1)(D) and 11347. BLE did not appeal the ICC's October 20, 1982 decision. Neither UTU nor any other union claimed on appeal that approval of MKT's trackage rights application allowing MKT to use its own crews violated the Railway Labor Act (or any other statute). The District of Columbia Circuit Court of Appeals rejected the unions' arguments assailing the level of employee protection imposed by the ICC and affirmed this aspect of the Commission's decision. *Southern Pacific Transp. Co. v. ICC*, 736 F.2d 708, 725 (D.C. Cir. 1984) (per curiam), *cert. denied*, 105 S.Ct. 1172 (1985).

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[2]ICC also granted certain trackage rights requested by Denver & Rio Grande Western Railroad Company. 366 I.C.C. at 572-578.

[3]Those conditions for employees affected by MKT's trackage rights application were as specified in *Norfolk and W. Ry. Co.—Trackage Rights—BN*, *354 I.C.C. 605 (1978)*, as modified in *Mendocino Coast Ry. Inc.—Lease and Operate*, 360 I.C.C. 653, 664 (1980). *See Union Pacific Corp., Pacific Rail System, Inc. and Union Pacific R.R.—Control—Missouri Pacific Corp. and Missouri Pacific R.R.*, supra, at 621.

Both prior to and subsequent to the Commission's October 20, 1982 order, MKT held discussions with BLE and UTU concerning the necessity to commence the trackage rights operations as soon as possible after approval was granted. In November, 1982, MKT exchanged proposals with BLE and UTU concerning the manning of the trackage rights operations. (J.A. at 27). MKT negotiated amendments to its collective bargaining agreements with BLE on January 5, 1983 to govern the trackage rights operation. On January 6, 1983, MKT commenced operations as a trackage rights tenant over the involved MP and UP lines using its own crews. *(Id.)*. On February 3, 1982, several weeks after the time for seeking judicial review had run, the International President of UTU expressly confirmed that Commission approval of MKT's trackage rights application gave MKT full authority to utilize its own crews. (MKT Motion to Dismiss, dated February 28, 1984, App. A and B). On March 10, 1983, MKT and MP filed a formal trackage rights agreement with ICC. (J.A. at x, No. 15). MKT reached formal agreements with UTU concerning the trackage rights operation on April 11 and April 13, 1983. (J.A. at 27).

Soon after MKT commenced its trackage rights operations, UTU, on behalf of MP employees, demanded of MP that *MKT* use MP crews to conduct *MKT's* trackage rights operations. MP did not accede to this demand, because ICC had specifically authorized MKT to use its own crews. As stated in UTU's brief to the court below, "petitioner UTU responded to MoPac's refusal to negotiate by declaring a strike of MoPac for April 4, 1983." (UTU Brief, p. 13). On March 30, 1983, MP filed a complaint in the Eastern District of Missouri seeking declaratory and injunctive relief against the strike. On that same date, the district court entered a temporary restraining order prohibiting, *inter alia*, implementation of UTU's strike threat. The district court preliminarily enjoined the strike on February 7, 1984, and issued a permanent injunction soon thereafter. *Missouri Pacific R.R. v. United Transp. Union*, 580 F. Supp. 1490 (E.D. Mo.), *appeal docketed*, No. 84-1465 (8th Cir. 1984).

On April 4, 1983, shortly after the district court issued a temporary restraining order prohibiting UTU's threatened strike, BLE filed with ICC a "Petition For Clarification" of the Commission's October 20, 1982 order, issued almost six months earlier. BLE cited "[r]ecent communications" from MP to the effect that MKT (and DRGW) were relying on the Commission's order in Sub-No. 25 (and

Sub-No. 18) as authority for the use of its own crews in performing the trackage rights operating in question. BLE argued that the Commission's October, 1982 order did not address the crew issue (J.A. at 2).

The Commission denied BLE's petition in an order served on May 18, 1983. In that decision, the Commission concluded as follows:

> The consolidation decision does not require clarification. We approved the responsive trackage rights applications of DRGW and MKT in Sub-No. 18 and Sub-No. 25 subject only to applicable employee protective conditions and the requirement that the parties negotiate compensation for use of the MP lines (or request us to set compensation in the event of an impasse). Inasmuch as DRGW and MKT proposed in their applications that the operations would be performed with their own crews, our approval of the applications authorizes such operations. . .
>
> BLE has presented no arguments or evidence setting forth any issue in need of clarification. Rather, BLE is attempting to re-argue an issue that has already been decided.

(A38).

Thereafter, on May 31, 1983, BLE filed with ICC a "Petition for Reconsideration" of the May 18 order. BLE contended that the Commission exceeded its jurisdiction in its October 20, 1982 order when it authorized MKT to use its own crews. BLE's conclusion and prayer for relief provided:

> In sum, the Brotherhood of Locomotive Engineers submits that the Commission does not have jurisdiction over these labor disputes since such matters are within the purview of the Railway Labor Act, and respectfully requests that the Commission grant this petition for reconsideration and issue an order holding that crew assignments and manning of positions are matters not within the jurisdiction of the Commission but are labor disputes to be resolved under the procedures of the Railway Labor Act.

(J.A. at 54).

On June 7, 1983, UTU also petitioned ICC for reconsideration of its May 18, 1983 order. UTU allegedly had presumed that the *Mendocino* conditions[4] would provide *MP* employees with an opportunity to participate in *MKT's* decision to assign crews for the trackage rights operation. (UTU Reply to MKT Motion to Dismiss at 14). UTU argued that:

> This Commission does not have the authority under 49 U.S.C. §11341 to grant an exemption from the unilateral change prescriptions of the Railway Labor Act, and even if it did, it has not done so in this case.

(J.A. at 77).

The Commission entered an order on October 25, 1983, denying BLE's and UTU's petitions for reconsideration (A40). In that decision, ICC held that it had jurisdiction under 49 U.S.C. §11341(a) to exempt a transaction approved under 49 U.S.C. §§11343 and 11344 from the provisions of the Railway Labor Act (A45 U.S.C. §156). In addition, it rejected UTU's argument that specific supporting findings of necessity were required to exempt the crewing issue from any other laws, since it had made detailed findings of the public interest requirements in approving MKT's trackage rights application, and since the identity of the crews was a material term of the approved transaction. In light of these facts, the Commission found that Section 11341 immunity was self-executing on the crew issue (A44-48).

In December, 1983, BLE and UTU filed with the District of Columbia Circuit petitions for review of the ICC's May 18, 1983 and October 25, 1983 orders. The unions claimed in the case below that, *inter alia*, ICC exceeded its authority by exempting MKT's decision to use its own crews in the trackage rights operation from the requirements of the Railway Labor Act.[5]

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[4]*See supra* note 3.

[5]The unions also argued that this action violated the *Mendicino* conditions imposed pursuant to 49 U.S.C. §11347, (*see supra* note 3), but the majority found it unnecessary to reach this issue in light of its view that the Commission failed to justify an exemption from the requirements of the Railway Labor Act (A13).

In a 2-1 decision, the District of Columbia Circuit vacated the ICC's May 18, 1985 and October 25, 1985 decisions. Judges Wright and Mikva found that ICC did not show a necessity for waiving the Railway Labor Act in the exercise of its Interstate Commerce Act authority.[6] (A13). The majority held that "the Commission must supply some basis for a necessity determination before the exemption authority applies," and relied upon a line of Supreme Court cases that supposedly hold that "ICC may waive . . . laws only if these . . . laws pose an obstacle to the transaction." (A14).[7] The majority rejected ICC's holding in the October 25, 1983 order that "the terms of Section 11341 immunizing an approved transaction from any other laws are self-executing," and stated that "to the extent that [the Eighth Circuit's decision in *Brotherhood of Locomotive Eng'rs. v. Chicago & N.W. Ry. Co.*[8]] may be read to say that ICC need supply no *basis* for the necessity determination, we find the interpretation ill-conceived and reject it" (A16, n.6). The majority then remanded the case to the Commission with instructions that "the Commission must explain why termination of the asserted right to participate in crew selection is necessary to effectuate the pro-competitive purpose of the grant of trackage rights or some other purpose sufficiently related to the transaction" (A17).

Judge MacKinnon filed a vigorous dissent to the majority opinion. He correctly noted that "the whole basis for granting the trackage rights, which included the crew selection provisions, was the implicit conclusion that the granting of such rights was *necessary* to the approval of the merger" (A24). He observed that 49 U.S.C. §11341(a) grants ICC very broad exemption powers and cited *Brotherhood of Locomotive Eng'rs. v. Chicago & N.W. Ry.*, 314 F. 2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963), to support his and the

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[6]The majority also rejected the arguments of respondents and intervenors that BLE and UTU's appeals were untimely since they were aggrieved by the October 20, 1982 decision of the ICC and failed to file their petitions for review within the statutorily prescribed 60-day period, as required by 28 U.S.C. §2344 (1982) (A9-12).

[7]*See Callaway v. Benton*, 336 U.S. 132 (1949), *Seaboard Air Line R.R. Co. v. Daniel*, 333 U.S. 118 (1948), *Texas v. United States*, 292 U.S. 522 (1934), and *Schwabacher v. United States*, 334 U.S. 182 (1948).

[8]*Brotherhood of Locomotive Eng'rs. v. Chicago & N.W. R.R. Co.*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963).

Commision's view that the terms of that paragraph are "self-executing" (A25-26). Judge MacKinnon discussed all of the Supreme Court cases relied upon by the majority to support its "obstacle" standard of exemption. His conclusion was that

> not only did the Supreme Court *not* adopt the rigorous 'obstacle' standard which the majority today requires, the Court envisioned that the legislative purpose was to grant the Commission *greater* authority than the majority suggests to override state laws where needed to approve transactions 'consistent with *the public interest*' and to ensure that they are 'just and reasonable.' *Schwabacher*, 334 U.S. at 94-95.

(A32).

Judge MacKinnon agreed with the majority's obvious assertion that "the ICC cannot bootstrap any exemption to its approval of transactions without justification," but he correctly pointed out that "this is far from such a case, since the necessity for waiver is clear" (*Id.*) He then stated,

> The whole point of granting the trackage rights applications was to reduce the anti-competitive effects of the consolidation (J.A. 169). Under the ICC's decision the Katy and the Rio Grande will be handling traffic for their own accounts, not for the consolidated UP-Missouri Pacific-Western Pacific (*Id.*). Thus, the trackage rights operations were meant to be conducted *in competition with* the merged UP-Missouri Pacific-Western Pacific operations, *id.*, and to offset to some extent the monopolistic effects of that enormous consolidation. The majority opinion gives short shrift to these essential reasons for the ICC's decision. To be sure, the Commission's goal of preservation of competition through the grant of trackage rights might well be frustrated by the prospect of requiring the railroads granted those rights to negotiate with the union representing the employees of its *competitors*. It is no surprise the Commission did not feel compelled to spell out specifically such a proposition.

(A32-33).

Both ICC and MKT filed petitions for rehearing and suggestions for rehearing *en banc*. Those petitions were denied by the District of Columbia Circuit in orders dated August 9, 1985.[9]

V.
REASONS FOR GRANTING THE WRIT

A. THE COURT OF APPEALS' INTERPRETATION OF 49 U.S.C. §11341(a) IS AT ODDS WITH THE LEGISLATIVE HISTORY AND UNAMBIGUOUS LANGUAGE OF THE STATUTE AND IS IRRECONCILABLE WITH THE DECISION OF THIS COURT IN *SCHWABACHER V. UNITED STATES*.

Section 11341(a) contains unmistakable language conferring broad authority upon ICC. It provides that the Commission's authority to approve transactions such as rail mergers is "exclusive" and exempts carriers, corporations, or persons participating in approved transactions "from the antitrust laws and from all other law, including state and municipal law as necessary to let that person carry out the transaction [and] hold, maintain or operate property. . . ." 49 U.S.C. §11341(a) (1982). By requiring ICC to make express findings to justify the necessity of every waiver before invoking its exemption authority under Section 11341(a), *in addition to* the findings mandated by 49 U.S.C. §11344, the majority, in Judge MacKinnon's words, "has made the ICC's Section 11341(a) exemption authority completely disappear," and has created a new step in the consolidation procedures required by the Act which will hinder rather than facilitate Congressional transportation policy.

Section 11341 was formerly Section 5(11) of the Interstate Commerce Act,[10] and was enacted into law as part of the Transportation

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[9]Circuit Judge MacKinnon voted to grant the petition for rehearing, and Circuit Judge Starr voted to grant the suggestion for rehearing *en banc* (A53-54).

[10]The Interstate Commerce Act was recodified in 1978 without substantive change. Interstate Commerce Act, Pub. L. No. 95-473, 1978 U.S. Code Cong. & Ad. News (92 Stat. 1337).

Act of 1940, 54 Stat. 908. On several occasions, this Court has examined the legislative history of that statute *(see, e.g., St. Joe Paper Co. v. Atlantic Coast Line R.R. Co.*, 347 U.S. 298, 315 (1954)), and has found that the congressional purpose in the sweeping revision in Section 5 of the Interstate Commerce Act in 1940 was "to *facilitate* merger and consolidation in the national transportation system" [emphasis supplied]. *County of Marin v. United States*, 356 U.S. 412 (1958). This Court also has observed that the enactment of Section 5(11) of the Transportation Act of 1940 constitutes "additional proof" of Congress' purpose to grant adequate power to the Commission to override laws which *may* interfere with efficient and economical railroad operation. *Seaboard Air Line R.R. Co. v. Daniel*, 333 U.S. 118 (1948).

The interrelationship of the exemption provisions of Section 5(11) and the merger approval provisions of Section 5(2) of the Interstate Commerce Act was addressed by the Court in *Schwabacher v. United States*, 344 U.S. 182 (1948). In that case, the Court held that

> approval of a voluntary railroad merger is dependent upon three, and upon *only* three, considerations: First, a finding that "it will be consistent with the public interest" (§5(2)(b)). Second, a finding that, subject to any modification made by the Commission, it is "just and reasonable" (§5(2)(b)). Third, assent of a "majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote" (§5(11)). [Emphasis added].

(Id. at 194*)*.

The Court then stated that,

> When these conditions have been compiled with, the Commission-approved transaction goes into effect without need for invoking any approval under state authority, and the parties are relieved of restraints, limitations, and prohibitions of law, Federal, State or municipal, insofar as may be necessary to enable them to carry into effect the transactions.

(Id.).

Thus, *Schwabacher* stands for the proposition that if the Commission makes the findings required by 49 U.S. §11344, as it undeniably did in this case, the exemption provisions of §11341(a) *automatically* apply to enable the carriers to effect the transaction.

The majority virtually ignored *Schwabacher* in its analysis of this Court's decisions. Instead, it relied on three decisions of this Court —*Callaway v. Benton*, *Seaboard Air Line R.R. Co. v. Daniel*, *and Texas v. United States* which assertedly supported its view that ICC only may waive laws that pose "obstacles" to transactions before it.

Judge MacKinnon ably highlighted the majority's erroneous reasoning. He noted that *Callaway* arose under Section 77 of the Bankruptcy Act (formerly 11 U.S.C. §205) rather than under the merger provisions of the Interstate Commerce Act, and " in its only comment relevant to this case," the Court indicated merely that nothing in its opinion should be read to derogate its prior opinions upholding the ICC's power to *override* state laws interposing obstacles in the path of otherwise lawful plans of reorganization. (A28). Similarly, *Seaboard* failed to support the majority's opinion. As stated above, the Court in that case acknowledged ICC's power to override laws that *may* interfere with approved transactions. That language alone vitiates the "obstacle" standard created by the majority in the case below.

Finally, *Texas v. United States* is also misinterpreted by the majority. As Judge MacKinnon correctly observed, the Court in that case emphasized that one purpose of the immunity provision was to promote economy and efficiency by removing burdens created by state laws. (A30). This reasoning is far removed from the majority's holding that a statute *must* create an obstacle to a transaction before an exemption may be granted.

By holding that ICC may exempt carriers only from laws that pose obstacles to a successful implementation of approved transactions, and holding that separate findings of "necessity" are required under 49 U.S.C. §11341 before an exemption may be granted, the court of appeals has ignored the clear meaning of the language of 49 U.S.C. §11341 and has rendered a decision that is irreconcilable with the *Schwabacher* decision of the Court.

B. THE JUDGMENT BELOW CONFLICTS WITH DECISIONS OF THE SIXTH AND EIGHTH CIRCUIT COURTS OF APPEAL AND CREATES A SPLIT OF AUTHORITY THAT CALLS FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION

In its October 25, 1983 decision, the Commission relied on the decision of the Eighth Circuit in *Brotherhood of Locomotive Eng'rs. v. Chicago and N.W. Ry.*, 314 F.2d 424 (8th Cir.), *cert. denied* 375 U.S. 819 (1963) to support its view that, once it made appropriate findings on the public interest aspects of a transaction under 49 U.S.C. §11344, the exemption provisions of §11341(a) are "self-executing." (A44). The District of Columbia Circuit's interpretation of the Commission's authority under 49 U.S.C. §11341(a) to exempt carriers from the requirements of the Railway Labor Act directly conflicts with *BLE* and decisions of other circuits as well.

In *BLE*, the Eighth Circuit characterized the basic issue presented as "whether the statutory authority conferred upon the ICC by the Interstate Commerce Act to approve and facilitate mergers of carriers includes the power to authorize changes in working conditions necessary to effectuate such mergers."[11] It examined the legislative history of former Section 5(2)(f) of the Interstate Commerce Act, (now 49 U.S.C. §11347) and it noted that Congress rejected an amendment to the Transportation Act of 1940 proposed by Representative Harrington which, if adopted, would have frozen existing employees in their job rights. The Eighth Circuit reasoned that

> the ICC['s] power to authorize mergers would be completely ineffective if authority to adjust work realignments through fair compensation did not exist... [U]nder the Railway Labor Act provisions, it is possible for either party

[11]Significantly, the majority in the case below suggest that MKT's trackage rights operation would create a unilateral change in the working conditions of MP employees, which would violate the Railway Labor Act [45 U.S.C. §156 (1982)]. (A7-16). As both the dissent and the Commission emphasized, no factual support whatsoever existed for that assertion, since the unions failed to introduce *any* evidence to establish the existing collective bargaining rights and actual working conditions of MP employees. (A24, A47).

> to completely block any change in working conditions by refusing to agree to a change and by refusing to arbitrate. Like the Harrington amendment, the Railway Labor Act, if it applied, would threaten to prevent many consolidations.

(*Id.* at 430-431).

As in this case, the Eighth Circuit was faced in *BLE* with an argument by the unions that the Commission made no "express finding" that the Railway Labor Act necessarily conflicted with the Commission's approval under the Interstate Commerce Act. *Id.* at 432. It then agreed with the Commission's interpretation of §5(11), as set forth in *Chicago St. P. M. & O. Ry. Lease*, 295 I.C.C. 696 (1958):

> We find nothing in that paragraph [§5(11)] or in other portions of Section 5, which authorizes us to determine and declare the particular laws within the scope of paragraph (11) from which a carrier shall be relieved. The terms of this paragraph are self- executing, and there is no need for this Commission expressly to order or declare that a carrier be relieved from certain restraints. *It is sufficient if we make clear what the carrier is authorized to do.* [Emphasis added.]

(*Id.* at 432).

The Eighth Circuit then noted that

> the Commission did actually approve the proposed merger and the included agreement for the protection of railroad employees as it was authorized to do. Such approval, in absence of language manifesting a contrary intent, carried with it any exemption from the restraints of other laws as contemplated by §5(11) to the extent necessary to carry out the merger.

(*Id.*).

The Eighth Circuit's interpretation of §5(11) was followed by the Sixth Circuit in *Nemitz v. Norfolk and W. Ry.*, 436 F.2d 841 (6th Cir.), *aff'd on other grounds*, 404 U.S. 37 (1971). In that case, arising out of another rail merger, the court of appeals was faced with a claim that the procedures of the Railway Labor Act rather than the employee

protective conditions imposed by the Commission were applicable to resolve a labor dispute. The Sixth Circuit rejected the Railway Labor Act argument, holding that

> there must be exclusive and plenary authority in the I.C.C. to achieve the purposes of the Act. The authority vested in the I.C.C. to effectuate proposed mergers would be rendered ineffective if authority to adjust work alignments through fair compensation did not exist. Since, under the Railway Labor Act, employees cannot be compelled to accept or arbitrate new working rules or conditions, the application of the Railway Labor Act to situations such as that presented here, like the Harrington Amendment, would threaten to prevent many consolidations, and, therefore, should not be applied.

(*Id.* at 845).

The judgment below directly conflicts with the decisions of Sixth Circuit in *Nemitz* and the Eighth Circuit in *BLE*. This Court should resolve the conflict by adopting the Eighth Circuit's interpretation of the statute.[12]

C. THE JUDGMENT BELOW OVERRULES WITHOUT JUSTIFICATION A LONG-STANDING INTERPRETATION OF THE INTERSTATE COMMERCE ACT BY THE INTERSTATE COMMERCE COMMISSION

This Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 104 S.Ct. 2778 (1984), summarized the proper standard

[12]The majority also relies on two decisions of the Fifth Circuit Court of Appeals to support its interpretation of 49 U.S.C. §11341. *See City of Palestine, Tex. v. United States*, 559 F.2d 408 (5th Cir. 1977), *cert. denied*, 435 U.S. 905 (1978), and *Texas & N. O. R.R. Co. v. Brotherhood R.R. Trainmen*, 307, 5.2d 151 (5th Cir. 1962), *cert. denied*, 371 U.S. 1952 (1963). (A15). However, unlike the present case, the Fifth Circuit in those two cases was not faced with a determination by ICC that the requested exemption related to a material term of the approved transaction. (*See* A50). Those cases merely stood for the obvious proposition that ICC may not exempt carriers from requirements of other laws unless the exemptions are necessary to enable the carriers to carry out the approved transactions.

of review of an agency's interpretation of its governing statute:

> When a court reviews an agency's construction of the Statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, *the court does not simply impose its own construction on the statute*, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. [Emphasis added.]

(*Id.* at 2781-2782 footnote omitted).

The Court also emphasized in *Chevron* that considerable weight should be accorded to the agency's construction of the statutory scheme it is entrusted to administer. (*Id.*at 2782).

The Court below simply ignored the guidance provided by *Chevron*. It erroneously reinterpreted Section 11341(a) without finding that the statutory language involved was ambiguous. It also failed to accord ICC its deserved deference in interpreting its governing statute. As Judge MacKinnon correctly put it, "in doing so, the panel has usurped the statutory authority of the ICC and has substituted its own judgment for that of the ICC." (A35).

The Commission's interpretation of 49 U.S.C. §11341(a), (as set forth in the *BLE* decision at page 14, *supra*), consistently has been followed for over twenty-five years. *See, e.g. Texas Turnpike Auth.-Abandonment-St. L. S.W. Ry. Co. of Tex.*, 328 I.C.C. 42, 46 (1965) *Ex Parte No. 260, Revised Regulations Governing Officers*, 336 I.C.C. 679, 682 (1970); *Railway Express Agency, Inc., Notes*, 348 I.C.C. 157, 215 (1975). That interpretation is consistent with the interpretation of the statute rendered by this Court and with the legislative history. It is inconceivable that the majority's interpretation rather than ICC's interpretation is correct, where the result of the majority's decision

could require MKT to bargain with MP's employees and face potential disruptions of service in its efforts to perform rail service required by the public interest. (A34).

VI.
CONCLUSION

For the foregoing reasons, Missouri-Kansas-Texas Railroad Company respectfully requests the Court to grant this petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, Petitioner,

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA, Respondents.

Missouri-Kansas-Texas Railroad Company, Denver & Rio Grande Western Railroad Company, Union Pacific Railroad Company, et al., Intervenors.

UNITED TRANSPORTATION UNION, Petitioner,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, Respondents.

Missouri-Kansas-Texas Railroad Company, Denver & Rio Grande Western Railroad Company, Union Pacific Railroad Company, et al., Intervenors.

Nos. 83-2290, 83-2317.

United States Court of Appeals, District of Columbia Circuit.

Argued Dec. 4, 1984.

Decided May 3, 1985.

As Amended July 12, 1985.

Vacated and remanded.

MacKinnon, Senior Circuit Judge, filed a dissenting opinion.

Petitions for Review of Orders of the Interstate Commerce Commission.

Harold A. Ross, Washington, D.C., with whom Gordon P. MacDougall, Washington, D.C., was on the brief, for petitioner in No. 83-2290.

John O'B. Clarke, Jr., Washington, D.C., for petitioner in No. 83-2317.

Sidney L. Strickland, Jr., Atty., I.C.C., Washington, D.C., with whom Robert S. Burk, Acting Gen. Counsel, and Henri F. Rush, Associate Gen. Counsel, I.C.C., J. Paul McGrath, Asst. Atty. Gen., and John J. Powers, III and Frederic Freilicher, Attys., Dept. of Justice, Washington, D.C., were on the brief, for respondents.

John H. Caldwell and Denise M. O'Brien, Washington, D.C., and Kendall T. Sanford, Denver, Colo., were on the brief for intervenor Denver & Rio Grande Western R. Co.

James M. Verner, Ronald B. Natalie and Joseph L. Manson, III, Washington, D.C., and Michael E. Roper, Dallas, Tex., were on the brief for intervenor Missouri-Kansas-Texas R. Co. William C. Evans, Washington, D.C., entered an appearance for that intervenor.

James V. Dolan, Charles A. Miller, and Gregg H. Levy, Washington, D.C., and Nina K. Wuestling, St. Louis, Mo., were on the brief for intervenors Union Pacific R. Co. and Missouri Pacific R. Co.

Before WRIGHT and MIKVA, Circuit Judges, and MacKINNON, Senior Circuit Judge.

Opinion for the court filed by Circuit Judge WRIGHT.

Dissenting opinion filed by Senior Circuit Judge MacKINNON.

J. SKELLY WRIGHT, Circuit Judge:

Two unions—the Brotherhood of Locomotive Engineers (BLE) and the United Transportation Union (UTU)—object to the Interstate Commerce Commission's interpretation of labor issues arising from ICC's approval of a railroad consolidation.

The unions claim that, when the dust settled from the consolidation, certain railroads had effectively squeezed them out of their previous role in determining the crews used on particular routes. At the time, in early 1983, the unions objected and argued that the rail-

roads' actions violated statutory labor protections. Since the railroads responded that ICC had given the full crew selection rights in the consolidation approval, the unions appealed to ICC for an order clarifying that its general consolidation approval did not affect previous labor arrangements, including crew selection rights.

In two decisions ICC rejected the unions' arguments. It maintained that the railroads' intentions on crew selection had been clear in the consolidation as approved and that ICC's authority to exempt transactions from legal obstacles, 49 U.S.C. §11341(a) (1982), immunized these crew selection prerogatives from later attack.

The unions now petition this court to vacate those ICC decisions. Four railroads—the Denver & Rio Grande Western (D&RGW), the Missouri-Kansas-Texas (MKT), the Missouri Pacific (MP), and the Union Pacific (UP)—are intervening in support of the Commission.

Because we find that ICC made no semblance of a showing that the exemption was necessary, as required by the exemption authority section, we vacate the ICC decisions and remand the case to the Commission for proceedings consistent with this opinion.

I. BACKGROUND

A. Legal Framework

This case presents the intersection of two statutory mandates—ICC's exclusive authority to approve rail consolidations under the Interstate Commerce Act and the statutory protection for rail labor employees under both the Railway Labor Act and the Interstate Commerce Act. The unions argue that (1) ICC did not show a necessity for waiving the Railway Labor Act in the exercise of its Interstate Commerce Act approval authority, and (2) ICC *cannot* waive the Interstate Commerce Act's labor protection conditions in the exercise of that approval authority. Ultimately, we find the Railway Labor Act argument dispositive, and we vacate the ICC decisions on that basis. To fully understand the texture of this dispute, however, it is necessary to examine the Interstate Commerce Act labor protection conditions as well.

1. *ICC's approval authority.* Under the Interstate Commerce Act, ICC has exclusive authority to approve certain consolidations and mergers. 49 U.S.C. §11341 *et seq.* (1982). The Act enumerates the types of transactions to which ICC's approval authority applies, *id.* §11343,

and the considerations that must guide ICC. *id.* 11344. Most significantly for this appeal, "[a] carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction." *Id.* §11341(a). Thus ICC has the power to approve a transaction and exempt its participants from legal obstacles that would impede its fruition.

In the exercise of this authority to exempt consolidations from the constraints of applicable statutes, ICC has certain ultimate constraints on its broad authority. First, there is a necessity component to the plenary authority: the statute specifies that ICC may exempt transactions from applicable laws *"as necessary"* for completion of the transaction. Second, as with any agency action, ICC's exercise of its authority must comport with the requirements of reasoned decisionmaking. *See generally United States v. ICC*, 396 U.S. 491, 90 S.Ct. 708, 24 L.Ed.2d 700 (1970).

2. *Labor protection requirements.* Statutory protections for railroad employees have received considerable congressional attention. Two important statutory vehicles for the current labor protection requirements are the Railway Labor Act, 45 U.S.C. §151 *et seq.* (1982), and the Interstate Commerce Act's labor protection section, 49 U.S.C. §11347.

The Railway Labor Act creates a highly structured system for administering and resolving labor disputes. In passing the Railway Labor Act Congress sought, in part, "[t]o avoid any interruption to commerce * * *, to forbid any limitation upon freedom of association among employees * * *, [and] to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions[.]" 45 U.S.C. §151a. The statute specifies eleven general duties of rail carriers, *id.* §152. It also creates a variety of mechanisms to settle rail labor disputes—a National Railroad Adjustment Board, *id.* §152, a National Mediation Board, *id.* §§154-155, and a system of arbitration, *id.* §§157-159. The statute gives special attention to changes in rates of pay, rules, and working conditions. It provides that employers give employees the opportunity for negotiation and mediation before implementing such changes. *Id.* §156; *see also*

id. §152, Seventh duty. The Railway Labor Act thus stands as an important structure for maintaining labor peace and fairness.

The Interstate Commerce Act labor protection section, 49 U.S.C. §11347, affords employees substantial protection from the effects of mergers and consolidations. Such labor protection conditions have a long history. See *New York Dock Railway v. ICC*, 609 F.2d 83,86-90 (2d Cir. 1979). In its current version the section provides that, in the exercise of its approval authority, "the Interstate Commerce Commission *shall require* the carrier to provide a fair arrangement at least as protective of the interests of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976 * * *." 49 U.S.C. §11347 (emphasis added).

ICC has specified the particular conditions that must be observed for this Section 11347 requirement. The conditions for protecting labor in a *merger* are known as *New York Dock* conditions, *see New York Dock Railway*, 360 ICC 60 (1979), *aff'd sub nom. New York Dock Railway v. ICC, supra.* The conditions for protecting labor in *transfers of trackage rights* are known as *Norfolk & Western* conditions, *see Norfolk & Western Railway Co.*, 354 ICC 605 (1978), *modified by Mendocino Coast Railway, Inc.*, 360 ICC 653, 664 (1980), *aff'd sub nom. Railway Labor Executives' Ass'n v. United States*, 675 F.2d 1248 (D.C. Cir.1982). These conditions include negotiation and mediation for dismissal and displacement of employees, 354 ICC at 610-611, 360 ICC at 85; dismissal and displacement compensation, 354 ICC at 611-612, 360 ICC at 86; and a system of arbitration, 354 ICC at 613, 360 ICC at 87-88. Generally, the conditions provide that "[t]he rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits * * * of railroads' employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statues." 354 ICC at 610, 360 ICC at 84. ICC has thus established conditions for discharging its statutory responsibility to protect labor benefits in the midst of consolidations.

In short, ICC has authority to approve certain transactions, even to the extent of exempting the transactions from other laws. At the same time, the Railway Labor Act structures rail labor relations, and

the Interstate Commerce Act's labor protection section gives rail employees a measure of protection from the effects of rail transactions.

B. The Current Dispute

This dispute has three important stages: (1) ICC's consolidation approval in 1982; (2) the post-approval conflict over crew selection; and (3) the two ICC decisions in 1983.

1. *ICC approval for the consolidation.* In 1982 UP and MP applied to ICC for approval of a consolidation under ICC's exclusive authority.[1] Several railroads and several unions (including the petitioners) objected to the proposed consolidation. On October 20, 1982 ICC approved the consolidation, but it also approved the application of two railroads for "trackage rights"[2] over specified MP routes to ameliorate possible anticompetitive effects. D&RGW received trackage rights for one route (Pueblo, Colorado to Kansas City, Missouri), and MKT received trackage rights for several other routes. *See Union Pacific-Control-Missouri Pacific*, 366 ICC 459 (1982), *affirmed in part and remanded in part sub nom. Southern Pacific Transportation Co. v. ICC*, 736 F.2d 708 (D.C. Cir.1984) *(per curiam)*, *cert. denied*, — U.S. —, 105 S.Ct. 1172, 84 L.Ed.2d 322 (1985). These are the four railroads who are intervening in support of the ICC decisions—the two who received ICC approval of their consolidation (UP and MP) and the two who received trackage rights for MP routes as conditions of that approval (D&RGW and MKT).

In their applications for trackage rights D&RGW and MKT both commented on crew selection. D&RGW specified that it could, at its option, use its own crews when it used the newly granted trackage rights, Finance Docket No. 30,000 (Sub-No. 18) (DRGW-8) *(cited in* ICC Decision of October 25, 1983, Joint Appendix (JA) 164); MKT specified that it *would* use its own crews, Finance Docket No.

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[1]Western Pacific Railroad Company was also involved in the consolidation, but its role is not relevant to these petitions.

[2]"Trackage rights" give one railroad the right to run its trains over another railroad's tracks. Indisputably, trackage rights are "'subject to ** specific negotiations,'" dissent at 734. They are also subject to governing statutes and to the conditions of the Commission's approval, including the imposition of general labor protection conditions.

30,000 (Sub-No. 25) (MKT-25) *(cited in* ICC Decision of October 25, 1983, JA 164).

In granting the trackage rights ICC did not mention crew selection. The Commission primarily addressed the need for the trackage rights to prevent possible anticompetitive effects from the consolidation. 366 ICC at 566-568, 572-578. Indeed, the Commission denied part of MKT's application for trackage rights because it did not agree that these trackage rights were needed to promote competition. *Id.* at 570-572. Notably, ICC emphasized that its general trackage rights approval was subject to the *Norfolk & Western* conditions that protect workers' rights in trackage rights situations. 366 ICC at 654; *id.* at 621-622. This statement was ICC's only reference to labor arrangements in the use of trackage rights.

2. *The crew assignment controversy.* After the consolidation became effective, the railroads began performing their approved trackage rights operations. D&RGW temporarily used MP crews on the MP routes, but claimed that it would soon use its own crews. Exhibit A to BLE's Petition for Clarification of ICC's October 20, 1982 decision, JA 6. MKT, meanwhile, began using its own crews. UTU's Petition for Reconsideration of ICC's denial of BLE's Petition for Clarification at 3, JA 74. The unions objected. They claimed that the unions representing MP employees had an established right to a role in crew assignment and that the railroads were changing that condition without consulting them. Both D&RGW and MKT, however, claimed that the ICC approval of their applications gave them a right to use their own crews and that ICC's exemption authority immunized this right from later legal challenge. MP's Reply to BLE's Petition for Clarification at 11, JA 24; UTU's Petition for Reconsideration at 3-4, JA 74-75.

D&RGW also made an additional argument. The Atchison, Topeka, & Santa Fe Railway Company had challenged D&RGW's temporary use of MP crews in the trackage rights as anticompetitive and impermissible. On November 24, 1982 and January 18, 1983, ICC issued decisions rejecting the challenge and upholding D&RGW's plans, including the preliminary decision to use existing MP crews. The Commission noted that D&RGW had the choice of using its own crews; the Commission did not mention any lurking labor relations issues. ICC Decision, November 24, 1982, at 3 (D&RGW brief, Ap-

pendix B); ICC Decision, January 18, 1983, at 3 (*id.*, Appendix C). In response to the unions' challenge, D&RGW claimed that these ICC decisions settled the validity of its crew selection plans. Reply of D&RGW to BLE's Petition for Clarification, JA 9-10.

Initially, the two unions responded to the railroads' position on crew selection in different ways. The United Transportation Union threatened to strike over the crew assignment issue. MP sought an injunction preventing the threatened strike. On March 1, 1984 the District Court for the Eastern District of Missouri issued such an injunction. *Missouri Pacific R. Co. v. United Transportation Union*, 580 F.Supp. 1490 (E.D.Mo.1984). An appeal from that injunction is pending.

The Brotherhood of Locomotive Engineers took a different tack. On April 4, 1983 it filed a petition with the Commission and requested clarification that the consolidation approval did not alter previous labor arrangements, particularly with respect to crew selection. BLE claimed that the normal Railway Labor Act and Interstate Commerce Act labor protection conditions (§11347) should apply. BLE's Petition for Clarification, JA 2-4. After ICC rejected BLE's interpretation in a May 18, 1983 decision, UTU joined BLE in a May 31 petition requesting reconsideration. On October 25, 1983 the Commission elaborated on its earlier decision and continued to reject the unions' contentions.

3. *The ICC decisions.* In its May 18 decision refusing BLE's request, ICC maintained that it had already decided the issue of crew selection. The Commission claimed that it had exempted the crew selection provisions, which it had not mentioned in its decision, from all legal obstacles because those provisions were in the trackage rights applications. "Inasmuch as DRGW and MKT proposed in their applications that the operations would be performed with their own crews, our approval of the applications authorizes such operations. * * We have broad authority to impose conditions on consolidation and our jurisdiction in plenary. Therefore, we properly authorized performance of trackage rights tenants using their own crews." ICC Decision of May 18, 1983 at 4-5, JA 36-37. ICC did not specifically address the Railway Labor Act and Section 11347 arguments. Thus in its May decision ICC implied that it had immunized the crew selection prerogatives from legal obstacles by dint of having approved the trackage applications.

In its October decision the Commission again denied the unions' request. It rejected the notion that it had to provide some basis for concluding that waiver of the Railway Labor Act was necessary to the transaction. "The terms of section 11341 immunizing an approved transaction from any other laws are self-executing and there is no need for us expressly to order or to declare that a carrier is specifically relieved from certain restraints." ICC Decision of October 25, 1983 at 7, JA 163. The Commission similarly rejected the claim that Section 11347 rights were being violated. "To the extent that existing working conditions and collective bargaining agreements conflict with a transaction which we have approved, those conditions and agreements must give way to the implementation of the transaction. The labor conditions imposed under section 11347 preserve conditions and agreements in the context of the authorized transactions." *Id.* at 6, JA 162. The Commission thus continued to maintain that it had immunized the crew selection from all subsequent legal obstacles, and it continued to offer no analysis of the necessity of this immunity for completion of the transaction.

The unions filed petitions to this court. They claim that ICC exceeded its authority by unjustifiably waiving the Railway Labor Act and the Interstate Commerce Act labor protection conditions.

II. THRESHOLD ISSUES

Before reaching the statutory issues, we must consider two threshold issues: timeliness and issue preclusion.

A. *Timeliness*

ICC and the four intervening railroads argue that the unions are barred because their appeal is not timely. We disagree.

The timeliness dispute turns on the interpretation to be given various Commission actions. The jurisdictional statute permits judicial review if an appeal of a final order is filed within 60 days. 28 U.S.C. §2344 (1982). The railroads and ICC contend that ICC's final order on crew selection prerogatives issued on October 20, 1982 (the decision giving general approval for the UP/MP consolidation, subject to the grant of trackage rights to D&RGW and MKT). They argue that the unions' appeals for clarification in April 1983 (resulting in the May 1983 decision) and May 1983 (resulting in the October 1983

decision) are entitled to no weight because those ICC decisions were merely procedural refusals to reopen a matter decided in the October 1982 order.

The railroads and ICC rely heavily on *Nat'l Bank of Davis v. Office of Comptroller of Currency*, 725 F.2d 1390 (D.C. Cir.1984) *(per curiam)*. In that case the court ruled that a petition for review was not timely when petitioner took no action during the statutory time period of 30 days, asked the agency to reconsider two months after the decision, and sought to invoke the court's jurisdiction by filing a petition for judicial review within 30 days after the agency denied the petition for reconsideration. The railroads and ICC argue that, similarly, in the case on appeal, the unions seek to make their petition timely by dating the time period for judicial review only from the procedural refusal to reopen a previous proceeding.

[1] Their reliance on *Davis* is misplaced. As this court observed some time ago in *Investment Company Institute v. Board of Gov. of FRS*, 551 F.2d 1270, 1281-1282 (D.C.Cir.1977), and very recently in *Eagle-Picher Industries, Inc. v. EPA*, 759 F.2d 905, 912, 915 (D.C.Cir.1985) time limits on review may, in exceptional circumstances, be "excused" when an issue is not ripe for review during the statutory period. As we emphasized in *Eagle-Picher*, petitioners generally are obliged to seek judicial determination of the *ripeness* of their claims during the statutory period. "In general, we will refuse to hypothesize whether, in retrospect, a claim would have been deemed ripe for review had it been brought during the statutory period, in order to save an untimely claim." 759 F.2d at 909. However, we specifically noted that "[e]xceptions occasionally may be justified in the light of changed circumstances giving rise to a new cause of action beyond the statutory period for review; compelling case precedent that makes it clear beyond doubt that the claim was not ripe during the statutory period; or clear evidence that a failure to consider a petitioner's claims would work a manifest injustice." *Id.*

[2] The instant case clearly presents a situation in which the petitioners' claim ripened after the expiration of the statutory period due to changed circumstances resulting from a misleading statement of position by ICC. The petitioners had no notice of their present claim until after ICC denied their petition for clarification and reconsideration thereof. In its initial decision, the ICC specifically said that the

statutory labor protection conditions would apply and, thus, it would have been premature for the unions to have claimed that the conditions were being violated. The Commission and the railroads argue that the trackage applications specifically noted that D&RGW *might*, and MKT *would*, use their own crews, and thus there was no ripeness problem. However, those applications were bounded by ICC's general pronouncement that the labor protection conditions would not be violated. As soon as it became apparent that MKT intended to use its own crews, the unions petitioned ICC for clarification of the application of the labor protection conditions. The issue did not become ripe for judicial review until the Commission had specified that crew selection was exempt from all otherwise applicable legal requirements.[3]

[3,4]Nor can it be claimed that the petition should be barred because it was not filed within 60 days after the May decision. For the Commission then undertook extensive review and issued a lengthy opinion in October. If the motion for reconsideration is filed within the statutorily prescribed review period, the time limitation tolls until the agency issues its final decision on the motion for reconsideration, *see Outland v. CAB*, 284 F.2d 224 (D.C.Cir.1960); *Davis, supra*, 725 F.2d at 1391 n. 5, and it is tolled while the agency is giving full consideration to the issues presented for judicial review, see *Nat'l Insulation Transportation Committee v. ICC*, 683 F.2d 533, 543 n. 17 (D.C.Cir. 1982).

[5] The railroads and the Commission also claim that the petition should be barred as untimely because ICC clarified its policy on crew assignment in decisions issued on November 24, 1982 and January 18, 1983. At that time D&RGW had not exercised its option

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[3]The dissent's extended timeliness objection rests on a single, mistaken assumption: "Though these labor protections were held to be applicable in general, * * * they were to be inapplicable to the crew selection issue since the crew selection provisions constituted part of the trackage rights applications approved by the final order of the Commission." Dissent at 727. Unfortunately, not one word of ICC's October 1982 decision suggested that its unequivocal commitment to labor protection conditions was somehow "inapplicable to the crew selection issue." From all appearances, ICC's imposition of labor protection conditions qualified its approval of the crew selection applications, rather than the reverse. Therein lies the nub of this case and the reason why petitioners' claim was in fact, not ripe until ICC modified that earlier commitment in the proceedings at issue.

to use its own crews: the Atchison, Topeka & Santa Fe Railway was protesting its use of MP crews as anticompetitive. In its decisions ICC noted that D&RGW had the option of using its own crews. The argument that this statement should have put the unions on notice is unconvincing: nothing suggested that ICC had changed its view that the general labor protection conditions would apply in full force. The dispute is not over whether the railroads could use their own crews: it is whether they could use their own crews subject to the requirements of the labor protection conditions. Before May 1983 the Commission never suggested that D&RGW and MKT could use their own crews *without* observing the basic labor protection conditions. And before the railroads refused to negotiate in early 1983, the unions had no reason to appeal to the Commission for clarification. Thus the November 1982 and January 1983 decisions should not stand as a bar: although those decisions suggested that the railroads could use their own crews, ICC did not suggest that they could do so without observing the basic labor protection conditions.

Finally, pointing to the principle that parties should raise their objections in administrative proceedings, *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 73 S.Ct. 67, 97 L.Ed. 54 (1952), the railroads and ICC claim that the unions should have raised their objection in the October 1982 proceeding. However, in the administrative proceedings the unions did argue for vigorous labor protections, 366 ICC at 621-622. As discussed, it was not until the May decision that the unions should have realized that the labor protection conditions would not be fully applicable to crew selection.

B. *Issue Preclusion*

[6] MKT raises an additional threshold objection. It claims that the crew selection issues were decided in the opinion accompanying the Missouri District Court's injunction prohibiting UTU from striking, *see Missouri Pacific R. Co. v. United Transportation Union*, *supra*, 580 F. Supp. 1490, appeal pending, and that issue preclusion prevents this court from reaching the issues. This argument is frivolous. Despite broad dicta, the District Court recognized that it had no power to consider the validity of ICC orders. *See id.* at 1502 ("The United States Courts of Appeals are vested with exclusive jurisdiction to determine the validity of orders of the ICC."). Thus there can be no preclusive effects on this court's review of the validity of the ICC

order. *See 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE §4420 (1981)* ("The fundamental rationale of issue preclusion dictates the clearly settled requirement that it be limited to matters that have been actually decided.").

We thus reject the threshold objections and turn to the merits of the unions' contentions.

III. STATUTORY ISSUES

The unions raise two statutory arguments: (1) ICC offered no inkling of a justification for the view that waiving the Railway Labor Act with respect to crew assignment was necessary to effectuate the transaction, and (2) the Interstate Commerce Act labor protection conditions (49 U.S.C. §11347) may not be waived because the labor protection section specifically qualifies ICC's consolidation approval authority (49 U.S.C. §11341). We find the first argument decisive.

The unions claim that ICC has wholly failed to justify the necessity for waiving the Railway Labor Act's applicability to the crew selection issue. The Commission claims that no such justification is necessary.

[7] Although an agency receives deference in interpreting its organic statute, the agency's authority is not unbounded. *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, —- & n. 8, 104 S.Ct. 439, 444 & n. 8, 78 L.Ed.2d 195 (1983). In reviewing an agency's interpretation we must consider whether it is within the delegation to the agency envisioned by Congress. *State of Montana v. Clark*, 749 F.2d 740, 744-747 (D.C.Cir.1984). Our analysis must begin with the language of Congress. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, — U.S. —, —, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984). [8] The statutory language dictates that the Commission's exemption authority applies only "as necessary" to allow transactions to occur. 49 U.S.C. §11341(a). Congress has given ICC broad powers to immunize transactions from later legal obstacles, but this delegation by Congress is explicitly qualified by a necessity component. The statute thus requires that the exemption authority operate according to necessity, not according to whim or caprice.

This statutory limit on the Commission's authority creates certain responsibilities for ICC. In exercising its waiver authority ICC must do more than shake a wand to make a law go away. It must supply a reasoned basis for that exercise of its statutory authority.[4]

This necessity component of ICC's waiver authority has not frequently arisen in the case law. In part this is because, in many of the ICC waiver authority cases, the necessity for the waiver is clear; the battle is fought over whether the waiver and transaction are in the public interest. *See, e.g., United States v. ICC, supra*, 396 U.S. 491, 90 S.Ct. 708, 24 L.Ed.2d 700. However, ample precedent supports the view that the Commission must supply some basis for a necessity determination before the exemption authority applies. In one line of cases the Supreme Court has assumed that ICC may waive state laws only if those state laws pose an obstacle to the transaction. *See Callaway v. Benton*, 336 U.S. 132, 140-141, 69 S.Ct. 435, 440-441, 93 L.Ed. 553 (1949) (waiver authority applies to "state laws interposing obstacles in the path of otherwise lawful plans of reorganization"); *Seaboard Air Line R. Co. v. Daniel*, 333 U.S. 118, 126, 68 S.Ct. 426, 430, 92 L.Ed. 580 (1948); *Texas v. United States*, 292 U.S. 522, 534-535, 54 S.Ct. 819, 825, 78 L.Ed. 1402 (1934).[5] Furthermore, the Supreme Court has stressed that the words of ICC's approval authority section must be carefully scrutinized to ensure that ICC does not exceed its statutory powers, *County of Marin v. United States*, 356 U.S. 412, 78 S.Ct. 880, 2 L.Ed.2d 879 (1958), and that ICC's approval authority, though broad, is ultimately reviewable as an exercise of reasoned decisionmaking. *See United States v. ICC, supra; Seaboard Air Line R. Co. v. United States*, 382 U.S. 154, 86 S.Ct.

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[4]This is not to say that the ICC must enumerate every legal obstacle that is waived in its approval. Such a requirement might undermine the approval authority's purpose of "facilitat[ing] merger and consolidation in the national transportation system. "*County of Marin v. United States*, 356 U.S. 412, 416, 78 S.Ct. 880, 883, 2 L.Ed.2d 879 (1958), because some legal obstacles to fruition of the transaction may not be entirely foreseeable at the time of approval. But ICC's decisionmaking process, either in the approval or in a later proceeding, must reveal evidence supporting a conclusion that waiver of particular legal obstacle is necessary to effectuate the transaction.

[5]*Schwabacher v. United States*, 334 U.S. 182, 68 S.Ct. 958, 92 L.Ed. 1305 (1948), also supports this analysis. As the Fifth Circuit has explained, "In *Schwabacher* * * * the insistence on further compensation by preferred stockholders of a merging company exceeded the compensation found just

277, 15 L.Ed.2d 223 (1965); *Minneapolis & St. Louis R. Co. v. United States*, 361 U.S. 173, 80 S.Ct. 229, 4 L.Ed.2d 223 (1959); *McLean Trucking Co. v. United States*, 321 U.S. 67, 64 S.Ct. 370, 88 L.Ed. 544 (1944).

Other courts have also emphasized that there must be a basis in the record for the conclusion that the statutory waiver is necessary to the transaction. In *City of Palestine, Texas v. United States*, 559 F.2d 408 (5th Cir.1977), cert. denied, 435 U.S. 950, 98 S.Ct. 1576, 55 L.Ed.2d 800 (1978), the Fifth Circuit provided an extensive analysis of this necessity problem. In vacating ICC's determination that it had waived certain contractual obligations the court stressed: "The ICC exceeds the scope of its authority when it voids contracts that are not germane to the success of the approved * * * transaction. In its grant of approval authority, Congress did not issue the ICC a hunting license for state laws and contracts that limit a railroad's efficiency *unless those laws or contracts interfered with carrying out an approved merger.*" *Id.* at 414 (emphasis added). Similarly, in an earlier case the Fifth Circuit noted that ICC approval of a carrier's plans did not automatically remove the requirements of the Railway Labor Act and the Norris-LaGuardia Act. *Texas & New Orleans R. Co. v. Bhd of Railroad Trainmen*, 307 F.2d 151 (5th Cir.1962), *cert. denied*, 371 U.S. 952, 83 S.Ct. 508, 9 L.Ed.2d 500 (1963). *See also Interstate Investors, Inc. v. Transcontinental Bus System, Inc.*, 310 F.Supp. 1053, 1068 (S.D.N.Y.1970) (court must determine whether waiver of antitrust laws is "necessary" to completion of transaction).[6]

[9] With these principles in mind, the current dispute comes clearly into focus. ICC claims that the Railway Labor Act was a "law" appropriately waived in the exercise of its exclusive authority. ICC's analysis of the necessity for waiving the Railway Labor Act, however, is virtually non-existent, both in the 1982 decision and in the 1983 decisions. In the 1982 decision ICC never offered a word about waiving

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and reasonable in the ICC's approved plan of merger. In each of these [Supreme Court] cases the voided state-related provision impinged upon the effectuation of the transaction. * * * In *all* of the cases approving the ICC's nullifications of state law, *the laws stood in the way of the approved transaction.*" *City of Palestine, Texas v. United States*, 559 F.2d 408, 414-415 (5th Cir.1977) (emphasis added), *cert. denied*, 435 U.S. 950, 98 S.Ct. 1576, 55L.Ed.2d 800 (1978).

[6]ICC relies on *Bhd of Locomotive Engineers v. Chicago & Northwestern*

the Railway Labor Act with respect to the crew assignment in the trackage rights, much less the necessity for doing so. As noted, it merely approved the trackage applications and specified that the labor protection conditions applied in full. In the 1983 decisions ICC continued to give no necessity justification for the waiver of the Railway Labor Act. It claimed that "[t]he terms of section 11341 immunizing an approved transaction from any other laws are self-executing and there is no need for us expressly to order or to declare that a carrier is specifically relieved from certain restraints." ICC Decision of October 25, 1983, JA 163. In its proceedings, then, the Commission did not give a shred of reasoning to support its view that completion of the transactions required shielding crew selection from the Railway Labor Act.[7]

ICC's complete failure to justify the necessity for waiving the Railway Labor Act respecting crew selection is especially conspicuous in light of evidence suggesting that the issue would *not* interfere with the trackage rights. First, the Commission specifically left the question of trackage compensation open to later negotiation between

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R. Co., 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819, 84 S.Ct. 55, 11 L.Ed.2d 53 (1963), to support its position. In that case the Eighth Circuit affirmed an ICC order that the Railway Labor Act would not apply. The government claims that *C&NW* stands for the proposition that the immunity is automatic and requires no finding of necessity. However, *C&NW* fails to carry the day for several reasons. First, *C&NW* itself recognized that immunity attached only to obstacles that would frustrate fruition of the merger. *Id.* at 432. Second, *C&NW* distinguished, but did not disagree with, *Texas & New Orleans. R. Co. v. Bhd of Railroad Trainmen*, 307 F.2d 151 (5th Cir.1962), *cert. denied*, 371 U.S. 952, 83 S.Ct.508, 9 L.Ed.2d 500 (1963). 314 F.2d at 433. And third, *C&NW* was explicitly limited to its facts. *Id.* at 434. *C&NW* did say that no *statement* of necessity was required. *Id.* at 432. To the extent that *C&NW* may be read to say that ICC need supply no *basis* for the necessity determination, we find the interpretation ill-conceived and reject it.

[7]ICC points to its October decision statement that "[t]he approval confers self-executing immunity on all material terms of the agreement from all other law to the extent necessary to permit implementation of the agreement." ICC Decision of Oct. 25, 1983 at 15, JA 171. It then claims that this reference to "material terms" provides a sufficient basis for immunity because crew selection was a "material term" of the trackage rights transaction. However, merely stating in totally conclusory terms that something is a "material term" is inadequate to provide the basis for the conclusion

the railroads, 366 ICC at 589-590; it never suggested why the question of crew selection was somehow so much more necessary to fruition of the transaction that normal Railway Labor Act procedures could not apply to the issue of crew selection. Second, ICC noted that MKT might find it necessary to use more crews than it suggested in its application, 366 ICC at 569-570; again, the Commission never suggested why the question of crew selection was so much more necessary to fruition of the transaction. On both of these issues, then, the Commission expressed a willingness to leave subsidiary trackage issues to later determination. Finally, the Denver & Rio Grande operated for some months with existing Missouri Pacific crews, and there has been no suggestion that the trackage rights were somehow frustrated as a result.[8]

In short, ICC has given no justification for a view that waiver of the Railway Labor Act is necessary to effectuate the transactions at issue. Indeed, the evidence in the record strongly suggests the contrary conclusion. The Commission therefore exceeded its authority when it claimed to have waived the Railway Labor Act regarding crew selection.

In view of this disposition, it is unnecessary to reach the second statutory issue—whether ICC may ever waive the labor protection condition section (§11347) through the exercise of the exemption authority (§11341(a)). That issue turns on whether Section 11347 is viewed as a "law" that may be appropriately waived, or as a specific qualification on the exemption authority itself. We note only that the Commission has completely failed to show any conflict between these two

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that waiver is necessary to fruition of the transaction, as §11341(a) requires. We do not, as the dissent suggests, "attempt[] to disregard" this statement. Dissent at 735. Rather, we search in vain for the articulated, rational explanation of this purported finding that elementary principles of reasoned decisionmaking clearly demand. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 245, 9 L.Ed.2d 207 (1962).

[8]The dissent's vehement protestations about the "procompetitive purpose" of the trackage rights approval are wide of the mark. For the question is whether the issue of *crew selection* somehow goes to that "pro-competitive purpose." ICC has never given the faintest hint of a reasoned explanation why crew selection is so essential to that purpose that the otherwise applicable provisions of the Railway Labor Act must be waived. Indeed, as discussed above, the evidence in the record indicates otherwise.

sections of the Interstate Commerce Act, which we assume were meant to be read in concert rather than in conflict, and we need not comment on the unlikely event that the two sections may pose a genuine conflict in some later case.[9]

We thus vacate the 1983 orders and remand the case to the Commission. The Commission is not empowered to rely mechanically on its approval of the underlying transaction as justification for the denial of a statutory right. On remand, to exercise its exemption authority, the Commission must explain why termination of the asserted right to participate in crew selection is necessary to effectuate the pro-competitive purpose of the grant of trackage rights or some other purpose sufficiently related to the transaction. Until such a finding of necessity is made, the provisions of the Railway Labor Act and the Interstate Commerce Act remain in force.

So ordered.

MacKinnon, Senior Circuit Judge (dissenting):

This case involves the consolidation of the Union Pacific Railroad Company ("UP"), the Missouri Pacific Railroad Company ("Missouri Pacific"), and the Western Pacific Railroad Company ("WP"), thus forming one of the nation's largest railroads. In an October 20, 1982 decision, the ICC granted specified trackage rights, over two sections of the Missouri-Pacific lines, to two railroads that would be harmed by the consolidation, the Missouri-Kansas-Texas Railroad Company ("Katy") and the Denver and Rio Grande Western Railroad Company ("Rio Grande"). The Commission authorized these two railroads to use their own crews to operate their own trains while exercising such trackage rights. My colleagues rule that the Commission has failed to find that it was "necessary" to the approval of the trackage rights applications and the underlying Union Pacific-Missouri Pacific-Western Pacific consolidation to waive any applicable protective labor conditions. In my view, the majority has ignored

[9]The unions have argued that the Railway Labor Act and § 11347 rights are largely coextensive in this case, and we thus view the Railway Labor Act argument as dispositive. To the extent that there is a meaningful difference between the Railway Labor Act and § 11347 protections, the unions have not argued it, and we need not address the issue. In any event, we note that our decision vacates the ICC decisions in their entirety.

the clear import of the record and, in a decision that pays lip service to our prescribed standard of review, substituted its judgment for that of the ICC. I therefore respectfully dissent.

I.

The majority holds first that the claims of the petitioning unions are not barred for being untimely because the October 20, 1982 ICC decision was not final and thus did not make the issue of crew selection ripe for review. I cannot agree with the majority's analysis.

This case began on September 15, 1980, when the UP, the Missouri Pacific, and the WP filed jointly for approval to consolidate. After the application was made public, 45 Fed.Reg. 68484 (1980), various parties entered the fray either to support or oppose the application. On January 13, 1981, the Katy and the Rio Grande opposed the consolidation and filed separate applications seeking protective trackage rights and other compensatory rights they alleged were necessary in order both to ameliorate the anticompetitive harms of the proposed consolidations and to protect them from revenue losses necessary to continue essential services.

The Katy sought trackage rights to operate over Missouri Pacific's tracks between Kansas City, Kansas, and Omaha, Nebraska, a distance of approximately 200 miles. The proposed operating agreement, as submitted to the ICC for approval, specified the operating conditions for the joint trackage rights and specifically stated:

> MKT [Katy], *with its own employees*, and at its sole cost and expense, shall *operate its engines, cars and trains on and along Joint Track.*

Finance Doc. No. 30,000 (Sub-No. 25) 1, Exh. No. 2 at 5 (emphasis added). The Rio Grande was harmed by the merger both at the Utah and the Pueblo, Colorado gateways. It sought joint trackage rights to operate over Missouri Pacific's tracks between Pueblo, Colorado, and Kansas City, Missouri, a distance of 619 miles. Its trackage rights application submitted for ICC approval stated:

> Rio Grande *may, at its option, elect to employ its own crews* for the movement of its trains, locomotives and cars to points on or over the Joint Track.

Id. (Sub-No. 18), Rio Grande Proposed Agreement §6(c)(3) (emphasis added). Thus, both railroads *expressly* requested ICC authority to use their own crews while operating their own "trains, locomotives and cars" over joint trackage with the Missouri Pacific.

On February 20, 1981, the Katy and the Rio Grande filed verified statements with the ICC in support of their applications for joint trackage rights. These statements indicated further that if the trackage rights were granted, the railroads would use their own crews. Verified Statements of Adolf Nance and Harold Hacker, quoted in J.A. at 165. In ruling on the applications, the *implicit issue* for the ICC was the degree of anticompetitive harm to which the Katy and Rio Grande would be subjected and accordingly what amount of compensatory rights would be *necessary* to protect the liability of the applicant railroads and to guarantee that they would furnish the necessary competition to the merged railroads. The petitioning unions, the Brotherhood of Locomotive Engineers ("Engineers" or "union") and the United Transportation Union ("UTU" or "union"), participated in the ICC proceeding and submitted evidence in opposition to the joint trackage rights applications. Hearings proceeded for eleven months, ending in January, 1982. There is no indication, however, that petitioners ever contended that UP or Missouri Pacific employees had a right to participate in the crew selection decision.

On October 20, 1982, the ICC approved the consolidation of the UP, the Missouri Pacific, and the Western Pacific and made the consolidation subject to the usual labor protective conditions set forth in *New York Dock Ry. — Control — Brooklyn, Eastern Dist. Terminal*, 360 I.C.C. 60 (1979). As part of the consolidation, while disapproving other requested compensatory conditions, the ICC specifically approved the applications of the Katy and the Rio Grande for the trackage rights described above, subject to the labor protection conditions specified in *Norfolk & Western Ry. Co. — Trackage Rights — Burlington Northern, Inc.*, 354 I.C.C. 605 (1978), as modified by *Mendocino Coast Ry., Inc. — Lease and Operate*, 360 I.C.C. 653, 665 (1980). *Union Pacific Corp., Pacific Rail System, Inc., and Union Pacific R.R. Co. — Control — Missouri Pacific Corp. and Missouri Pacific R.R. Co.*, 366 I.C.C. 459, 654 (1982). Though these labor protections were held to be applicable in general, I think it is clear that they were to be inapplicable to the crew selection issue since the crew selection provisions constituted part of the trackage rights applica-

tions approved by the final order of the Commission. Moreover, unlike other trackage rights-related requests by the Katy and Rio Grande which the Commission denied, *see* Majority Opinion at 724-725, there was no express denial of the crew selection requests. Therefore, the labor unions were on notice that the ICC had authorized the Katy and the Rio Grande to use their own crews in the operation of their own trains in the exercise of their joint trackage rights.

It was not until April 4, 1983, approximately five and one-half months after the ICC's decision approving the consolidation, that the Engineers filed a petition with the ICC seeking clarification of the October 20, 1982 decision. The ICC denied the Engineer's petition on the procedural grounds that crew selection had been an issue in the consolidation proceedings, that petitioners introduced no new evidence or arguments setting forth any issue in need of clarification, and that the issues involved had been decided in the Commission's October 20, 1982 decision. Following this denial, the UTU joined the Engineers in moving for reconsideration of the denial of the motion for clarification.

Time deadlines for requesting review of agency decisions are *jurisdictional* and cannot be enlarged by a reviewing court. *National Resources Defense Council v. NRC*, 666 F.2d 595, 602 (D.C. Cir. 1981); *Microwave Communications, Inc. v. FCC*, 515 F.2d 385, 388-389 (D.C. Cir. 1974). The Hobbs Act prescribes that judicial review must be sought within 60 days of a final order. 28 U.S.C. §2344 (1982). An action of the Commission is final on the date on which it is served, and exhaustion of further administrative remedies is not required. 49 U.S.C. §10327(i) (Supp. V 1981). The Commission's decision here was served on October 20, 1982. In this case, then, the statutory time period expired December 20, 1982. No judicial review was sought before that date.

We have also recognized that a party who had the opportunity to participate in the underlying proceedings is a party "aggrieved" under 28 U.S.C. §2344. *See Simmons v. ICC*, 716 F.2d 40, 42 (D.C. Cir. 1983). Yet I find no indication in the record or briefs that the Engineers or the UTU ever objected to the proposed crew provisions on the grounds that labor protections would be violated by granting them. Whatever caused petitioners not to seek timely review, it was not any ambiguity in the ICC decision of October 20, 1982. Petition-

ers plainly slept on whatever rights that they contend they possessed.

Determined to reach the contentions raised by this petition, however, my colleagues accept the labor union's argument that the crew selection issue was not ripe for review when the ICC served its decision. Petitioners contend that the issue was not ripe because the ICC's general pronouncement that the *New York Dock* and *Norfolk* labor protection provisions would apply somehow nullified the *express* statements in the applications regarding crew selection. The unions claim that they petitioned for clarification of the October 1982 decision as soon as it became apparent that the railroads intended to use their own crews, *i.e.*, when the railroads began to file their trackage rights agreements with the ICC. Brief of BLE at 719.[1] This claim should not be accepted as extending the time to appeal. The railroads at that time were doing nothing more than exercising the rights clearly granted them by the October 20, 1982 decision. The unions had been on notice since the day the applications for trackage rights were filed on January 13, 1981, that the railroads intended to use their own crews to operate their own trains if their applications for trackage rights were approved. The ICC's October 1982 decision approved those applications and authorized the use of the applicant's own crews in the operation of their own trains.

Moreover, I find the majority's analysis particularly difficult to swallow in light of *Eagle-Pitcher Industries, Inc. v. EPA*, 759 F.2d 905 (D.C. Cir. 1985) (Opinion by Edwards, J.). In *Eagle-Pitcher* this court emphasized that "[a]s a general proposition . . . if there is *any* doubt about the ripeness of a claim, petitioners must bring their challenge in a timely fashion or risk being barred." *Id.* at 914. "[P]etitioners who delay filing requests for review on their own assessment of when an issue is ripe for review do so at the risk of finding their claims time-barred." *Id.* at 909. "Consequently," this court concluded,

> except where events occur or information becomes available after the statutory review period expires that essentially creates a challenge *that did not previous-*

[1]This contention imposes on the credulity of the court. The unions, if they ever looked at the applications of the Katy or the Rio Grande, and with their interest and the competency of their lawyers they must be presumed to have done so, must have known perfectly well that if trackage rights were granted the applicants intended to use their own crews.

> *ly exist* [emphasis added], or where a petitioner's claim is, under our precedents, *indisputably* not ripe until the agency takes further action, we will be very reluctant, in order to save a later petitioner from the strictures of a timeliness requirement, to engage in a retrospective determination of whether we would have held the claim ripe had it been brought on time.

Id. at 914. Under the *Eagle-Pitcher* analysis, at best petitioners must be said to have entertained "some" doubt about the ripeness of their claims. At worst, later occurrences did not create a challenge "that did not previously exist," nor were petitioners' claims "*indisputably* not ripe."

By this appeal petitioners plainly attempt to convert a petition to reconsider the denial of a motion for clarification into a challenge of a final decision by the ICC that granted the Katy and the Rio Grande the *right* to crew their own trains over joint trackage with the Missouri Pacific. Because the motion to clarify was denied on procedural grounds, the proper inquiry is whether the Commission's decision on the motion to reconsider the denial of the motion to clarify is a decision *on the merits*. A decision on the merits of the motion for reconsideration could extend the time period for seeking appellate review. *Bowman v. Loperena*, 311 U.S. 262, 61 S.Ct. 201, 85 L.Ed. 177 (1940). The majority, however, never reaches this question.

I thus disagree with the conclusion that the October 20, 1982 decision was not ripe for review. I am also disturbed by the ostensible ease by which the panel finds jurisdiction. Apparently, this court is not "fastidious about the impropriety of reaching merits issues without first establishing jurisdiction." *Beattie v. United States*, 756 F.2d 91, 126 (D.C. Cir. 1984) (Scalia, J., dissenting, opinion filed Feb. 26, 1985). *Compare Eagle-Pitcher, supra*, at 911 ("[p]roffered excuses for late filing are carefully scrutinized"). In my view, the very substantial delay of petitioners should not be so rewarded. My only solace lies in the hope that the majority's retrospective ripeness analysis is motivated by the fact that the present proceedings were conducted without the benefit of *Eagle-Pitcher*.

II.

Even assuming a finding of jurisdiction in this case is correct,

the majority has clearly erred in its decision on the merits. It decides that because the ICC did not make an *express* finding that the waiver of any labor protections applicable to the crew selection provisions in the trackage rights applications was "necessary" to approval of the transaction, it exceeded its authority under the Interstate Commerce Act, 49 U.S.C. §11341(a) (Supp. IV 1981), in excepting those provisions from any labor protections.

Why the lack of an express "necessity" finding in and of itself requires the court to vacate the ICC's approval regarding crew selection on this record is puzzling. The whole basis for granting the trackage rights, which included the crew selection provisions, was the implicit conclusion that the granting of such rights was *necessary* to the approval of the merger. Presumably, the majority senses a conflict between the approved crew selection provision and the unions' asserted rights. The majority, however, if it knows, does not indicate what the parameters of the unions' claimed rights might be and similarly fails to state where, if anywhere, these rights and applicable labor protections intersect. For all the majority indicates, they may not conflict at all. Indeed, this was the conclusion reached by the ICC (J.A. 163-164). Obviously, if there is no conflict, there is no need to *vacate* the Commission's decision on crew selection. Yet, in the absence of any evidence supporting the unions' claims, and in the face of justifications for the ICC's decision, the majority, without further inquiry, leap frogs the Commission's findings and completely nullifies the *authority* of the ICC to provide for crew selection in trackage rights agreements imposed to ensure that consolidations are in the public interest. The majority's reasons for doing so are inexplicable.

The arguments of the Engineers and the UTU, and the majority decision itself, are based on the fundamental assertion by the unions that they enjoy by custom and by collectively-bargained agreements a right to crew all trains passing over the Missouri Pacific's tracks. This is tantamount to a declaration that the unions, in effect, have a proprietary interest in the tracks of their employer — an astonishing contention. Also implicit in the unions' assertion is the claim that the unionized employees of the consolidated railroads (the Missouri Pacific, UP, and WP) have colorable right to bargain *with the Katy and the Rio Grande* over who will crew the trains of the latter railroads. There is no basis in law or fact for such an absurd conclusion. It is basic contract law that one cannot be bound by agreements be-

tween third parties. Even assuming such rights might exist, the ICC found that "the record contains no evidence to support the contention of UTU and BLE that UP-MP employees have rights under collective bargaining agreements to participate in the crew selection process' of foreign railroads operatings under trackage rights (J.A. 168).

In my opinion the court errs partly because it confuses the issue in this case. It states that "[t]he dispute is not over whether the railroads could use their own crews; [the dispute] . . . is whether they could use their own crews subject to the requirements of the [statutory] labor protection condition." Maj. Op. at 722. The ICC's October 20, 1982 decision stated that the labor protections *would* apply to the transaction. As previously explained, the ICC saw no apparent conflict between the protective labor conditions and its decision to permit crew *selection* by the railroads who operate the trains. But in its 1983 decisions, in an effort to meet the unions' scattered arguments, the Commission ruled in the alternative that the crew selection process was exempt from any labor protection conditions that *might* apply. In my view the issue in this case, assuming that the applicable labor provisions in the Act conflict with the proposed ICC action, is merely whether the ICC had the authority to so exempt the crew selection process from applicable labor protection conditions, and if so, whether it properly exercised that authority. In all other respects, the statutory labor protections still apply.[2]

The Interstate Commerce Act in Section 11341(a) provides:

> The authority of the Interstate Commerce Commission under this subchapter is *exclusive*. . . . A carrier, corporation, or person participating in that transaction is exempt from the antitrust laws *and from all other law*, including State and municipal law, *as necessary to let that person carry out the transac-*

[2] *See* Brotherhood of Maintenance of Way Employees v. ICC, 698 F.2d 315, 317 n. 6 (7th Cir. 1983) ("The adoption of standard conditions, routinely imposed, often results in incorporation of superfluous provisions having no application to the particular case under consideration."). Because the majority did not reach the issue of whether the labor protections under 49 U.S.C. §11347 can be exempted through §11341(a)'s exemption power, I too express no view on that issue. However, it seems to me that in this case

> *tion*, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction. . . .

49 U.S.C. §11341(a) (emphasis added). The authority granted the ICC under this statute is very broad. To the extent necessary to approve a transaction — the merger in this case — the ICC may exempt the carrier involved from "*all other law*." This is plain language, and there is nothing on which to base any contention that it does not mean exactly what it says, or that the Railway Labor Act, 45 U.S.C. §§151 *et seq.* (1982)[3] is not a "law" subject to the exemption authority under §11341(a).

In *Brotherhood of Locomotive Engineers v. Chicago & North Western Ry. ("North Western")*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819, 84 S.Ct. 55, 11 L.Ed.2d 53 (1963), the court held that §5(11) of the Interstate Commerce Act (now §11341(a)) conferred exclusive and plenary jurisdiction upon the ICC to approve mergers and exempt the carrier from all other restraints of *federal law*, including the Railway Labor Act ("RLA"). *Id.* at 429, 431-432. In that pre-Staggers Act case, the court affirmed the order of the ICC that approved a stipulation by the carriers that overrode the RLA. The court rejected the union's claim, which is similar to that made here, that the ICC lacked jurisdiction because it failed to find *expressly* that the provisions of the Railway Labor Act were rendered inoperative. *Id.* at 432. Rather, the court agreed with the Commission's finding, as expressed in another proceeding, that "[t]he terms of this paragraph are self-executing, and there is no need for this Commission expressly to order or declare that a carrier be relieved from certain restraints." *Id.* (quoting *Chicago, St. Paul, Minneapolis & Omaha Ry. Lease*, 295 I.C.C. 696 (1958)).

In the present case the Commission similarly noted that the provisions of §11341(a) provide "*self-executing* immunity on all material

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where the trackage rights applications were approved specifically to offset the anticompetitive harms of the consolidation, the unions' rights under *N&W* Art. I §4 exist vis-a-vis the consolidating railroads and not against either the Katy or the Rio Grande.

[3] 45 U.S.C. §152, Seventh, for example, forbids generally a carrier's change in pay, rules, or working conditions *contrary to labor agreements*, without resort to negotiation.

terms of the agreement . . . to the extent necessary to . . . implement[ ] the agreement" (J.A. 171) (emphasis added). Granted, *North Western*, *supra*, involved a stipulation by the carriers which required arbitration in a manner similar to that provided by the RLA. The majority, however, refuses to recognize the clear breadth of the ICC's authority expressed in *North Western*. Rather, it attempts to distinguish the case by noting how *similar* it is to the present case, *see* Maj. Op. at 724 n. 6, a novel technique that substantially broadens the ability to reach the result desired by the majority.[4]

The apparent ease by which the majority arrives at its conclusion is attributable in large part to its mischaracterization of Supreme Court precedent. Through the majority's misreading of these cases, it has manufactured a wholly new and more difficult ICC waiver standard. The majority claims support from "one line of cases" that assertedly permits ICC waiver "only if those state laws pose an *obstacle* to the transaction." Maj. Op. at 723 (emphasis added). No such "line" exists.

The principal case the majority cites for its contention, *Callaway v. Benton*, 336 U.S. 132, 140-141, 69 S.Ct. 435, 440-441, 93 L.Ed. 553 (1949), set forth the majority's quote in *dicta*. *Callaway* involved a railroad reorganization under §77 of the Bankruptcy Act, 11 U.S.C. §205, and under the "narrow facts" there present (336 U.S. at 150,

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[4]*City of Palestine, Texas v. United States*, 559 F.2d 408 (5th Cir. 1977), *cert. denied*, 435 U.S. 950, 98 S.Ct. 1576, 55 L.Ed.2d 800 (1978), relied on by the majority, does not support its position. In that case, the ICC was found to have exceeded its authority when it voided an agreement with the city of Palestine to maintain a certain number of employees there, which was "not *germane* to the success of the approved . . . transaction." *Id.* at 414 (emphasis added). In the present case, not only does the record support the fact that the crew selection provision was important to ameliorate the anticompetitive aspects of the proposed consolidation, the Commission itself found the provision "material" to and "related to the transportation effects" of the transaction (J.A. 170, 171). Similarly, *Texas & New Orleans R.R. v. Board of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962), *cert. denied*, 371 U.S. 952, 83 S.Ct. 508, 9 L.Ed.2d 500 (1963), is not relevant to this case. That case involved the union's power to strike under the Norris-La-Guardia Act, 29 U.S.C. §§101 *et seq.*, and the court in fact stated that "Section [5(11), now §11341(a),] relieves the carriers of the restraints and limitations of other *laws*, but it does not, on its face, relieve them from the actions of other parties, i.e., the union's economic threat of a strike." *Id.* at 156 (emphasis added).

69 S.Ct. at 445), raised the question whether a bankruptcy court could enjoin a state court suit leading to a determination of the requirements of state law with respect to the sale of the entire assets of the lessor railroad. In its limited two paragraph discussion of §5(11) of the Interstate Commerce Act (now §11341(a)), the Court expressly rejected any reliance on that section of the Act and, furthermore, distinguished the Bankruptcy Act from the Interstate Commerce Act. *Id.* at 139-140, 69 S.Ct. at 440 ("[T]hat Section [§5(11)] relates to voluntary mergers, not to the purchase of a leased line as part of a plan of reorganization.") ("That power [under §77] flows from a different source than the power over consolidations under the Interstate Commerce Act."). In its only comment relevant to this case, the Court merely reiterated that nothing in its opinion should be read to derogate its prior opinions upholding the ICC's power "to *override* state laws interposing obstacles in the path of otherwise lawful plans of reorganization." *Id.* at 140-141, 69 S.Ct. at 441 (emphasis added) (footnote omitted).

The remaining cases cited by the majority similarly fail to support the proposition for which they are cited. In *Seaboard Air Line R. Co. v. Daniel*, 333 U.S. 118, 68 S.Ct. 426, 92 L.Ed 580 (1948), a South Carolina statute forbade the operation of foreign railroads in that state. The ICC approved a transaction and exempted the railroad from the strictures of the state law. The South Carolina Supreme Court held that the ICC lacked power under §5 to relieve the carrier from the state law requirements. The Court reversed, explaining:

> . . . Furthermore, since that case [*Texas v. United States*, 292 U.S. 522, 54 S.Ct. 819, 78 L.Ed. 1402 (1934)] was decided Congress has given additional proof of its purpose to grant adequate power to the Commission to override state laws which may *interfere with* efficient and economical railroad operation. By §5(11) of the Interstate Commerce Act, as amended by the Transportation Act of 1940, 54 Stat. 908, 49 U.S.C. §5(11), Congress granted the Commission "exclusive and plenary" authority in refusing or approving railroad consolidations, mergers, acquisitions, etc. *The breadth of this grant of power can be understood only by reference to § 5(2)(b) which authorizes the Commission to condition its approval upon "such terms and conditions and such modifications as it*

> *shall find to be just and reasonable.*" All of this power can be exercised in accordance with what the Commission may find to be "consistent with the *public interest.*" The purchaser of railroad property with Commission approval is authorized by §5(11) "to own and operate any properties . . . acquired through said transaction without invoking any approval under State authority," and such an approved owner, according to that paragraph, is "relieved from the operation of *the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved* . . . and to hold, maintain, and *operate* any properties . . . acquired through such transaction."
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> This language very clearly reposes power in the Commission to exempt railroads under a §5 proceeding from state laws which bar them from operating in the state *or impose conditions upon such operation.*

Id. at 125-126, 68 S.Ct. at 430 (emphasis added). Thus, the Court did *not* adopt an "obstacle" standard; rather it articulated the standard as being the "*public interest*" goal of the statute.

The third case cited by the majority, *Texas v. United States*, 292 U.S. 522, 54 S.Ct. 819, 78 L.Ed. 1402 (1934), concerned the ICC's approval of a transaction that had exempted a railroad from the prescriptions of a Texas statute which required a railroad operating in the state to maintain offices there. The Commission had found that requiring the railroad in question to maintain such offices would entail "unnecessary" and "burdensome" expenditures and waived compliance therewith. *Id.* at 533, 54 S.Ct. at 825. In upholding the ICC the Supreme Court noted:

> Title II of the Emergency Railroad Transportation Act, 1933, in amending §5 of the Interstate Commerce Act, carries its own provision as to immunity from state requirements which would stand in the way of the execution of the policy of the Congress through the Commission's orders.
>
> . . . .

> . . . . The scope of the immunity must be measured by the purpose which Congress had in view and had constitutional power to accomplish. As that purpose involved the promotion of *economy* and *efficiency* in interstate transportation by the removal of the *burdens* of excessive expenditures, the removal of such burdens when imposed by state requirements was an essential part of the plan. . . .

Id. at 534, 54 S.Ct. at 825. The granting of full trackage rights here is also an essential part of the plan to permit the merger and to compensate — in the public interest — for some of its anticompetitive effects.

Finally, in what can charitably be attributed to oversight, the majority fails to mention in its line of precedent and relegates to a footnote *Schwabacher v. United States*, 334 U.S. 182, 68 S.Ct. 958, 92 L.Ed. 1305 (1948), which contradicts the majority's position by stating that the "*public interest*" is the controlling consideration.[5] In *Schwabacher*, the ICC approved, again under §5(11), the voluntary merger of three railroads. Intervening dissenting shareholders of one of the merging railroads alleged that the terms of the merger would deprive them of charter rights granted by their company's state of incorporation. The Commission, however, disclaimed jurisdiction to pass on the claims of the shareholders and stated that the railroads were free to settle such controversies "through negotiation and litigation in the courts." *Id.* at 188, 68 S.Ct. at 962. The Supreme Court reversed. It held that the Commission erred in renouncing its authority to determine finally the rights of the dissenting shareholders, and specifically held that

> . . . *no rights* alleged to have been granted to dissenting stockholders by state law provision concerning liquidation *survive* the merger agreement approved by the requisite number of stockholders and approved by the Commission as just and reasonable.

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[5]*Compare* Callaway v. Benton, 336 U.S. 132, 141 n. 10, 69 S.Ct. 435, 441, n. 10, 93 L.Ed. 553 (1949) ("Seaboard Air Line R. Co. v. Daniel, 333 U.S. 118, 68 S.Ct. 426, 92 L.Ed. 580; Schwabacher v. United States, 334 U.S. 182 [68 S.Ct. 958, 92 L.Ed. 1305]; Texas v. United States, 292 U.S. 522 [54 S.Ct. 819, 78 L.Ed. 1402].") (emphasis added), *with* maj. Op. at 723.

Id. at 201, 68 S.Ct. at 968 (emphasis added). The Court reasoned that it would be "inconsistent to allow state law to apply a liquidation basis . . . for continued public service." *Id.* at 200, 68 S.Ct. at 968. Regarding the waiver authority, the Court reaffirmed that "'Congress has long made the maintenance and development of an economical and efficient railroad system a matter of primary national concern. Its legislation must be read with this purpose in mind.'" *Id.* at 193-194, 68 S.Ct. at 964 (quoting *Seaboard Air Line R. Co. v. Daniel*, 333 U.S. 118, 124-125, 68 S.Ct. 426, 430, 92 L.Ed. 580 (1948)). The Court noted that "[t]he tenor of all . . . [its prior decisions under the Transportation Act of 1920, 41 Stat. 456] was to confirm the power and duty of the Interstate Commerce Commission, *regardless of the state law*, to control rate and capital structures, physical make-up and relations between carriers, in the light of the *public interest* in an efficient national transportation system." *Id.* at 192, 68 S.Ct. at 963 (emphasis added). Similarly, "[t]he Transportation Act of 1940 [54 Stat. 908, 49 U.S.C. §5(11)] . . . authorized approval by the Commission of carrier-initiated, voluntary plans of merger or consolidation if, subject to such terms, conditions and modifications as the Commission might prescribe, the proposed transactions met with certain tests of *public interest, justice and reasonableness*, in which case they should become effective *regardless of state authority*." *Id.* at 193, 68 S.Ct. at 964 (emphasis added) (footnote omitted).[6]

In sum, not only did the Supreme Court *not* adopt the rigorous "obstacle" standard which the majority today requires, the Court envisioned that the legislative purpose was to grant the Commission *greater* authority than the majority suggests to override state laws where needed to approve transactions "consistent with *the public interest*" and to ensure that they are "just and reasonable." *Schwabacher*, 334 U.S. at 194-195, 68 S.Ct. at 965.

The majority would admonish us that the ICC's exemption authority under section 11341(a) must operate "according to necessity, not according to whim or caprice" and that in exercising this

[6]The majority's citation to County of Marin v. United States, 356 U.S. 412, 78 S.Ct. 880, 2 L.Ed.2d 879 (1958) in this discussion is misleading. That case held only that the transaction involved was not within § 5(2)(a) because one party in the acquisition was not a "carrier." The case had nothing to do with the scope of the Commission to approve transactions that *are* within the Commission's jurisdiction or with its waiver authority.

authority. "ICC must do more than shake a wand to make a law go away." Maj. Op. at 723. However, in this case it is not the ICC but the majority of the panel which relies on occult powers. For it is the majority who has made the ICC's Section 11341(a) exemption authority completely disappear and who has used its opinion to obscure the basis for the ICC's decision to exempt the crew selection process from any protective labor conditions.

There is no dispute here that the approval of the Katy and Rio Grande trackage rights was "necessary" to the approval of the UP-Missouri Pacific-Western Pacific consolidation. The ICC specifically found that the trackage rights were needed to offset the anticompetitive harms created by the consolidation. 366 I.C.C. 459, 566-579. This court has affirmed this aspect of the ICC's decision. *Southern Pacific Transportation v. ICC*, 736 F.2d 708 (D.C. Cir. 1984) (per curiam), *cert. denied*, ____ U.S. ____, 105 S.Ct. 1172, 84 L.Ed.2d 322 (1985). But the ICC did not approve the trackage rights in the abstract; rather, it approved, pursuant to this "necessity" finding, the trackage rights as applied for by the Katy and the Rio Grande.

The ICC cannot bootstrap any exemption to its approval of transactions without justification. But this is far from such a case, since the necessity for the waiver is clear. The whole point of granting the trackage rights applications was to reduce the anticompetitive effects of the consolidation (J.A. 169). Under the ICC's decision the Katy and the Rio Grande will be handling traffic for their own accounts, not for the consolidated UP-Missouri Pacific-Western Pacific *(Id.)*. Thus, the trackage rights operations were meant to be conducted *in competition with* the merged UP-Missouri Pacific-Western Pacific operations, *Id.*, and to offset to some extent the monopolistic effects of that enormous consolidation.[7] The majority opinion gives short shrift to these essential reasons for the ICC's decision. To be sure, the Commission's goal of preservation of competition through the grant of trackage rights might well be frustrated by the prospect of requiring the railroads granted those rights to negotiate with the union representing the employees of its *competitors*. It is no surprise the Commission did not feel compelled to spell out specifically such a proposition.

Moreover, the majority's self-styled definition of "trackage rights," upon which the opinion depends, reduces that term to nothing more than a railroad's right only to have its traffic run over another's tracks.

See Maj. Op. at 718 n. 2. The majority *assumes*, with no justification whatsoever, that this cannot include a railroad's right to use its own crews in operating its own trains. This bespeaks an ignorance of what trackage rights might involve and ignores the crew selection provisions that are an integral part of the applications in this case. The majority, in fact, has pulled its definition out of its magic hat. Indeed, even UTU counsel at oral argument conceded that whether a railroad's "trackage rights" include a railroad's right to use its own crews "is really a very generic term subject to subsequent specific negotiations." The sole evidence of the meaning of the trackage rights that are here involved is found in the trackage rights applications and the decisions granting them.[8] Those applications stated in express terms that the Katy and Rio Grande would exercise their trackage rights by operating their own trains with their own employees and crews. But the majority *decides* in the teeth of the specific crew provisions themselves that trackage rights in this case do not include a railroad's right to use its own crews, even though such method of operating its trains was specifically applied for and authorized by the ICC.

That the ICC specifically left open for later negotiation between the railroads such terms as trackage compensation is no reason to infer that crew selection, which was specifically covered in the trackage rights applications, was not decided. Approval of crew selection had

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[7]For example, the ICC found that the UP-Missouri Pacific-WP consolidation itself, within the areas where the merged lines overlap, will reduce Missouri Pacific traffic on the Pueblo-Kansas City line by 18.7% in the years following the consummation of the merger. Granting the Rio Grande trackage rights will, as the ICC found, contribute substantially to the economic viability of the Pueblo-Kansas City line. 366 I.C.C. at 572. Moreover, the ICC found that granting the Rio Grande "independent access" to Kansas City through trackage rights would enable it to provide new competitive routes to compensate for the loss of traffic at the Utah gateway which the Rio Grande previously derived from its relations with the WP. *Id.* at 576. Thus, the ICC found a substantial public benefit realized by enhancing the stimulating competition in the central corridor. *Id.* Both the merged lines and the Rio Grande would benefit.

[8]Other cases have attempted to define "trackage rights." *See, e.g.*, Chicago, Rock Island & Pacific R.R. v. Chicago, Burlington & Quincy R.R., 437 F.2d 6, 10 (7th Cir.) ("Trackage rights" are continuing or permanent easements or licenses granted by one railroad to another railroad), *cert. denied*, 402 U.S. 996, 91 S.Ct. 2172, 29 L.Ed.2d 161 (1971).

been expressly requested in the railroad's application for trackage rights, and both applications had been approved. The ICC similarly considered it a "material term" of the trackage rights transaction (J.A. 171), a finding that the majority attempts to disregard. Whether a railroad uses its own crews to operate *its own trains* was not the type of "subsidiary" trackage issue the ICC left open for later negotiation. *See* Maj. Op. at 724-725. To require that the Katy and the Rio Grande submit the issue of crew selection to arbitration could frustrate the trackage rights agreement itself and could destroy one of the essential conditions upon which the ICC approved the merger.

Finally, petitioners cannot now complain that the Commission failed to make a specific finding about the necessity for the crew selection process when no party, *including the petitioners*, contended during the hearings that granting the pending applications of the Katy and Rio Grande would improperly override existing collective bargaining agreements (J.A. 164, 167).

The majority has thus found itself with the rather absurd result that the Katy and the Rio Grande may not, in the exercise of their trackage rights, use their *own* employees to operate their *own* trains carrying their *own* traffic, for their *own* account, until the railroads have engaged in collective bargaining under the Railway Labor Act with their employees and possibly those of competitor railroads. As one trial judge has already noted in a related proceeding involving many of the same issues as we have here, "Congress did not intend that affected employees have such power to block consolidations which are in the public interest." *Missouri Pacific R.R. v. United Transportation Union*, 580 F. Supp. 1490, 1505 (E.D. Mo. 1984), *appeal pending* (8th Cir.).

In my view, the majority has vacated the ICC's crew provision based on assumptions not supported by the record. It has closed its eyes to the specific pro-competitive purpose that the ICC found would be served by the approval of the trackage rights applications in this case. In doing so, the panel has usurped the statutory authority of the ICC and has substituted its judgment for that of the ICC. I cannot join in such a curtailment of the authority that Congress has granted to the ICC under 49 U.S.C. §11341(a), and which the ICC exercised to ensure that the consolidation it approved would serve the "*public interest*." 366 I.C.C. at 572, 644. Since this is one of the largest mergers

in the history of American railroads, the majority's failure to correctly apply the law here could lead to tremendous nationwide harm. Accordingly, I dissent.

APPENDIX B

INTERSTATE COMMERCE COMMISSION DECISION

Finance Docket No. 30,000 (Sub-No. 18)

DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY—TRACKAGE RIGHTS—MISSOURI PACIFIC RAILROAD COMPANY—BETWEEN PUEBLO, CO AND KANSAS CITY, MO

Finance Docket No. 30,000 (Sub-No. 25)

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY —TRACKAGE RIGHTS-MISSOURI PACIFIC RAILROAD COMPANY—BETWEEN KANSAS CITY, KS AND OMAHA, NE

PETITION FOR CLARIFICATION

Decided: May 12, 1983

By petition filed April 4, 1983, the Brotherhood of Locomotive Engineers (BLE) seeks clarification of our decision[1] approving the consolidation of the Union Pacific Railroad Company (UP) and Missouri Pacific Railroad Company (MP) (collectively referred to herein as applicants). The Missouri-Kansas-Texas Railroad Company (MKT), the Denver and Rio Grande Western Railroad Company (DRGW), and applicants have filed replies.

BACKGROUND

Pursuant to 49 U.S.C. §11343-4, applicants sought authority to consolidate their railroad systems under the common control of Union Pacific Corporation and Pacific Rail System, Inc., a new railroad holding company.[2] The consolidation decision, served October 20,

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[1] *Union Pacific—Control—Missouri Pacific; Western Pacific*, 366 I.C.C. 459 (1982), embracing Finance Docket No. 30,000 (Sub-No. 18), *Denver and Rio Grande Western Railroad Company—Trackage Rights—Missouri Pacific Railroad Company- Between Pueblo, CO and Kansas City, MO*, and Finance Docket No. 30,000 (Sub-No. 25), *Missouri-Kansas-Texas Railroad Company—Trackage Rights—Missouri Pacific Railroad Company—Between Kansas City, KS and Omaha, NE.*

[2] In another application, handled on a consolidated basis, UP sought authority to acquire control of Western Pacific Railroad Company.

1982, which BLE seeks to have clarified, approved the proposed transaction[3] subject to various conditions. These conditions included approval of DRGW and MKT responsive trackage rights applications in the embraced Sub-No. 18 and Sub-No. 25 proceedings, respectively. The approved trackage rights authorize DRGW to operate over MP's line between Pueblo, CO, and Kansas City, MO, and authorize MKT to operate over MP's line between Kansas City, KS and Omaha, NE. Approval of the consolidation was conditioned upon the grant of these trackage rights in order to protect the public interest from potential anticompetitive harms.

POSITIONS OF THE PARTIES

BLE: BLE seeks to have the consolidation decision clarified with respect to whether MKT and DRGW may use their own operating crews in performing trackage rights operations over MP lines. It asserts that this Commission has no jurisdiction over crew assignment matters and that our decision should not be construed as authorizing MKT or DRGW to use their own crews in the performance of the approved operations. It indicates that these matters are subject to settlement in accordance with the Railway Labor Act and are not within the scope of our decision approving the responsive trackage rights applications.

MKT: MKT asserts that the consolidation decision clearly and correctly authorizes it to conduct trackage rights operations using its own crews. MKT's operating plan submitted as part of its trackage rights application specified that the operations would be conducted using MKT crews. The application was approved without restrictions on the proposed operating plan. MKT notes that we have very broad conditioning powers under 49 U.S.C. §11343 in consolidation proceedings and that our jurisdiction over consolidations, and the terms and conditions thereof, is plenary under 49 U.S.C. §11341.

DRGW: DRGW contends that our later decisions in these proceedings, served November 24, 1982, and January 18, 1983, regarding DRGW trackage rights operations clearly and unambiguously state that DRGW has been authorized to conduct operations over MP lines using its own crews. Therefore, DRGW considers this issue to be moot with respect to its operations.

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[3] The consolidation was subsequently consummated on December 22, 1982.

Applicants: Applicants argue that the consolidation clearly authorized MKT and DRGW to operate using their own crews. The trackage rights applications specified that the trackage rights tenants would use their own crews and no party opposed that aspect of the plans during the course of these proceedings. Approval of the applications, including the operating plans, they state, is within our jurisdiction.

DISCUSSION AND CONCLUSIONS

The consolidation decision does not require clarification. We approved the responsive trackage rights applications of DRGW and MKT in Sub-No. 18 and Sub-No. 25 subject only to applicable employee protective conditions and the requirement that the parties negotiate compensation for use of the MP lines (or request us to set compensation in the event of an impasse). Inasmuch as DRGW and MKT proposed in their applications that the operation would be performed with their own crews, our approval of the applications authorizes such operations. Our decisions of November 24, 1982, and January 18, 1983, unambiguously specified that trackage rights tenants may perform operations using their own crews.[4]

BLE has presented no arguments or evidence setting forth any issue in need of clarification. Rather, BLE is attempting to reargue an issue that has already been decided. Its petition does not present any facts, however, that warrant reopening these proceedings for reconsideration. We have broad authority to impose conditions on consolidations and our jurisdiction is plenary. Therefore, we properly authorized performance of trackage rights tenants using their own crews. The petition will be denied.

[4]This includes current employees of MKT and DRGW as well as any new employee they may hire of their own free will (including MP employees).

This action will not significantly affect the quality of the human environment or energy conservation.

It is ordered:

1. The petition of BLE for clarification is denied.

2. This decision shall be effective on the date it is served.

By the Commission, Chairman Taylor, Vice Chairman Sterrett, Commissioners Andre and Gradison.

(SEAL)

Agatha L. Mergenovich
Secretary

APPENDIX C

INTERSTATE COMMERCE COMMISSION DECISION

Finance Docket No. 30,000 (Sub-No. 18)

DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY-TRACKAGE RIGHTS-MISSOURI PACIFIC RAILROAD COMPANY-BETWEEN PUEBLO, CO AND KANSAS CITY, MO

Finance Docket No. 30,000 (Sub-No. 25)

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY-TRACKAGE RIGHTS-MISSOURI PACIFIC RAILROAD COMPANY BETWEEN KANSAS CITY, KS AND OMAHA, NE

PETITION FOR CLARIFICATION

Decided: October 19, 1983

By petition filed May 31, 1983, the Brotherhood of Locomotive Engineers (BLE) and United Transportation Union (UTU) seek reconsideration of our decision served May 18, 1983, denying BLE's petition for clarification in these proceedings. Replies have been filed by Missouri-Kansas-Texas Railroad Company (MKT), Denver and Rio Grande Western Railroad Company (DRGW), and jointly by Union Pacific Railroad Company (UP) and Missouri Pacific Railraod Company (MP). UTU has petitioned for leave to file a reply to the replies.

PROCEDURAL MATTER

Our Rules of Practice do not permit a reply to a reply, 49 C.F.R. §1104.13(c). UTU, however, contends that its tendered reply is necessary for a clear presentation of the issues. As the reply does not broaden the scope of UTU's petition, we will accept the reply for filing so that we may fully address the issues.

BACKGROUND

By decision served October 20, 1982, the Commission approved the consolidation of UP and MP under the common control of Union Pacific Corporation and Pacific Rail System, Inc. *Union Pacific-Control-Missouri Pacific; Western Pacific*, 366 I.C.C. 459 (1982).

Several railroads, including DRGW and MKT, opposed the consolidation and filed responsive applications for the imposition of trackage rights conditions. BLE, UTU, and various other railway labor organizations opposed the consolidation and actively participated in the consolidation and responsive trackage rights applications proceedings.

As conditions to approval of the consolidation we approved DRGW's application for trackage rights over MP's line between Pueblo, CO and Kansas City, MO, and MKT's applications for trackage rights over UP and MP lines extending between Kansas City, KS, Topeka, KS, Omaha, NE, and Lincoln, NE. Pursuant to 49 U.S.C. §11343-4, we approved the proposed trackage rights agreements submitted by DRGW and MKT in their responsive applications, subject to determination of fair compensation for use of the trackage rights and further subject to our usual employee protective conditions.[1] DRGW's proposed agreement specified that DRGW could, at its option, perform trackage rights operations using its own crews. MKT, pursuant to its proposed agreement, would use its own crews in performing its operations.

After consummation of the consolidation, DRGW and MKT began performing the approved trackage rights operations. A dispute then arose between the involved railroad and BLE over whether the trackage rights tenants could perform operations over MP's lines using their own crews without the consent of the unions representing MP's employees. BLE's petition for clarification sought a decision stating that his Commission has no jurisdiction over these crew assignment disputes and that the consolidation decision and approval of trackage rights did not authorize DRGW and MKT to operate over MP lines using their own crews. BLE and UTU now seeks reconsideration of our decision denying that request for relief.

In its petition for reconsideration, BLE contends that this Commission has no jurisdiction over crew assignment disputes and that they must be settled under the procedures of the Railway Labor Act (RLA) 45 U.S.C. §151, *et seq.* BLE further asserts that trackage rights operations by DRGW and MKT using their own crews constitute a

[1] *Norfolk and Western Ry. Co.—Trackage Rights-BN*, 354 I.C.C. 605 (1978), as modified by *Mendocino Coast Ry., Inc. -Lease and Operate*, 360 I.C.C. 653, 664, (1980) (NW-BN conditions).

unilateral change in working conditions by MP in violation of the labor protective conditions imposed on the consolidation.[2]

UTU argues that the Commission's plenary jurisdiction over railroad consolidations does not authorize us to immunize a transaction from the requirements of the RLA or to approve unilateral changes of collective bargaining agreements. UTU states in the alternative that if the Commission has jurisdiction it failed to make necessary findings supporting overriding the RLA or showing how the policies of the RLA were accommodated with those of the Interstate Commerce Act.

In their replies, DRGW, MKT, and UP-MP assert that the arguments of BLE and UTU are legally incorrect, that petitioners have failed to satisfy the procedural requirements for reopening a proceeding, and that the allegations of violations of the RLA and collective bargaining agreements were not raised during the course of the proceedings on the consolidation and the responsive trackage rights application.

UTU, in its response to the railroads' pleadings, make further arguments regarding purported violations of the RLA, collective bargaining agreements, and the *New York Dock* conditions. It asserts that the trackage rights operations involve work which, by custom, is to be performed by MP employees. Thus, operations using the tenant's crews are unauthorized transfers of the work in violation of the RLA. It further states that only the Federal Courts have jurisdiction to determine whether an agreement violates the RLA. UTU also argues that we did not, and could not, determine that MP employees have no right to participate in the trackage rights crew selection process. It contends that such a determination would deprive MP employees of property rights without due process and would violate the requirements of 49 U.S.C. 11347 and of the *NW-BN* and *New York Dock* conditions.

DISCUSSION AND CONCLUSIONS

The various arguments of BLE and UTU are all based essentially on the assertion that the proposed trackage rights operations which

[2]The consolidation is subject to the usual labor protective conditions as set forth in *New York Dock Ry.-Control-Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979) (*New York Dock* conditions).

we have approved involve UP-MP unilaterally changing the working conditions of their employees by transferring work which, by custom and under collective bargaining agreements, is to be performed by UP-MP employees. This purported change, petitioners argue, violates the RLA and the *New York Dock* and *NW-BN* conditions. Petitioners contend that UP-MP employees, through their bargaining agents, have the right to participate in the trackage rights crew selection process and have the right to have any related disputes resolved pursuant to the RLA and the applicable labor protective conditions. We find these arguments to be unpersuasive and unsupported by the record in these proceedings.

Jurisdiction. Although we conclude that the trackage rights agreements do not involve a change in UP-MP employees' working conditions in a manner contrary to RLA requirements, we will address UTU's argument that we lack jurisdiction under 49 U.S.C. 11341 to exempt a transaction from the requirements of the RLA.

The Commission's jurisdiction over railroad consolidations and trackage rights transactions, within the scope of 49 U.S.C. 11343, is exclusive. Our approval exempts such a transaction from the requirements of all laws as necessary to permit the transaction to be carried out, and includes an exemption from the requirements of the RLA. *See Brotherhood of Loc. Eng. v. Chicago & North Western Ry. Co.*, 314 F.2d 424, 432, (8th Cir. 1963), *cert. denied* 375 U.S. 819 (1963).

Contrary to UTU's arguments, the 4-R Act[3] did not limit our authority to exempt a transaction from the RLA. Rather, the 4-R Act specified standards for the minimum level of employee protection to be imposed as conditions to the approval of certain transactions. Those standards, however, do not require preserving rights under the RLA. Affected carrier employees have rights to the extent specified in the protective conditions imposed pursuant to 49 U.S.C. 11347.

As UTU notes, standard labor protection conditions generally preserve working conditions and collective bargaining agreements. The terms of those conditions, however, must be read in conjunction with our decision authorizing the involved transaction and the underlying statutory scheme. To the extent that existing working condi-

[3]Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976).

tions and collective bargaining agreements conflict with a transaction which we have approved, those conditions and agreements must give way to the implementation of the transaction. The labor conditions imposed under section 11347 preserve conditions and agreements in the context of the authorized transaction.

Employees adversely affected by the transaction may receive benefits under the protective conditions and under pre-existing agreements to the extent those benefits are not pyramided. If our approval of a transaction did not include authority for the railroads to make necessary changes in working conditions, subject to payment of specified benefits, our jurisdiction to approve transactions requiring changes of the working conditions of any employees would be substantially nullified. Such a result would be clearly contrary to congressional intent. The discussion of this point in *Brotherhood of Loc. Eng., supra*, at 430-1, is persuasive and we conclude that this reasoning is unaffected by the enactment of the 4-R Act.

Supporting Findings. Petitioners argue that even if the Commission has jurisdiction to exempt the transactions from the RLA, we failed to do so in this proceeding. Further, they argue that we have not attempted to reconcile the decision with the policies of the RLA nor made any findings supporting an exemption from the RLA.

The terms of section 11341 immunizing an approved transaction from any other laws are self-executing and there is no need for us expressly to order or to declare that a carrier is specifically relieved from certain restraints. *See Brotherhood of Loc. Eng., supra, citing Chicago, St. P., M. & O. Ry. Lease*, 295 I.C.C. 696, at 432 (1958).

In evaluating a transaction under the criteria of 49 U.S.C. 11344, we must consider the policies of statutes other than the Interstate Commerce Act to the extent that those policies are relevant to the determination of whether a proposal is consistent with the public interest. For example, the public interest evaluation must include consideration of the policies of the antitrust laws. *See McLean Trucking Co. v. United States*, 321 U.S. 67, 87 (1944).

While the RLA, like the antitrust laws, embodies certain public policy considerations, the Interstate Commerce Act also specifies that the interests of affected employees must be considered. In these proceedings we gave full consideration to the impact of the consoli-

dation on railroad employees in accordance with our established policies. 366 I.C.C. 618-22.

The record in these proceedings is devoid of any suggestion by BLE, UTU, or any other party that the approval of the responsive trackage rights applications, subject to the usual labor protective conditions, would be in any way inconsistent with the policies of the RLA. In these circumstances, we can find no merit in UTU's argument that we improperly failed to reconcile the policies of the RLA with our decision.

Labor Conditions. Petitioners contend that operations by the trackage rights tenants, using their own crews, over UP-MP lines would constitute a unilateral change in working conditions for UP-MP employees in violation of the *NW-BN* and *New York Dock* conditions. They further contend that these crew assignment disputes are labor issues in which the Commission should not be involved. As previously discussed, the standard labor conditions do not freeze working conditons which must be altered to implement an approved transaction. The record in these proceedings strongly supports the conclusion that the approved trackage rights operations are not inconsistent with the terms of any collective bargaining agreements or of the imposed labor conditions.

BLE, UTU, and various other railway labor organizations participated in these proceedings, and none made any argument or presented any evidence that the responsive trackage rights proposals would violate any applicable labor agreements. Rather, the record supports the conclusion that the trackage rights operations, using the tenants' crews, could be implemented as approved without raising any dispute over crew assignments between the employees of different railroads.

The responsive trackage rights applications in these proceedings were filed in January 1981, and in accordance with regulations, included proposed trackage rights agreements which specified the operating conditions for the trackage rights. The agreement in MKT's application specified: "MKT, with its own employees, and its sole cost and expense, shall operate its engines, cars and trains on and along Joint Track." Proposed agreement Section 5, MKT trackage rights appliction, Finance Docket No. 30,000 (Sub-No. 25) (MKT-25). DRGW's application provided: "Rio Grande may, at its option, elect

to employ its own crews for the movement of its trains, locomotives and cars to points on or over the Joint Track. . . ." Proposed agreement Section 6(c)(3), DRGW trackage rights application, Finance Docket No. 30,000 (Sub-No. 18) (DRGW-8). Therefore, in January 1981, over a month before the commencement of hearings, all parties had notice that the responsive trackage rights applicants sought authority to perform operations using their own crews.

On February 20, 1981, DRGW and MKT filed their verified statements in support of their responsive applications. These statements further make clear the position of those carriers that, if their applications were approved, they would have the right to conduct trackage rights operations using their own crews. For example, DRGW's evidence stated: "If our trackage rights applications are granted, both over WP[4] and MP, we anticipate that a fewer number of employees will be displaced, or a reduction of 176 jobs as opposed to 350 jobs if these applications are not granted." Verified Statement of A.E. Nance, at 15. MKT's evidence stated: "The projected position impacts shown on Exhibit 4 [to the trackage rights applications] reflect our determination of the number of positions that would be created, eliminated or transferred, or the other affects of such actions due to the acquisition of trackage rights. Our determinations were based primarily on the essential provisions of the applicable labor agreements and consultation with other carrier officers." Verified Statement of Harold M. Hacker, at 2. These verified statements clearly demonstrate the intent of MKT and DRGW to operate using their own crews. The assessments of labor impacts make no mention of any possibility of UP-MP employees having any right to perform the proposed operations.

During the course of hearings in these proceedings, DRGW and MKT witnesses Nance and Hacker were cross-examined on the testimony in their verified statements. No labor party cross-examined Mr. Hacker. *See* Transcript, Finance Docket No. 30,000, Bifurcated Hearing, June 23, 1981, at 3398-3417. Thus, Mr. Hacker's testimony regarding labor impact on MKT employees as a result of approval of the proposed trackage rights operations stands in the record without qualification.

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[4]The application for trackage rights over the Western Pacific Railroad Company was subsequently withdrawn.

Mr. Nance was cross-examined by various parties, including UTU. Under cross-examination by counsel for UP-MP, Mr. Nance testified that DRGW was willing to negotiate with UP-MP regarding whose crews would perform operations. Transcript, Finance Docket No. 30,000, June 23, 1981, at 8432-3. He testified that "as these trackage rights are granted to us we are willing to sit down and work out any kind of arrangement you [UP-MP] want." at 8433, *also see* at 8449-50. Mr. Nance's testimony clearly states that the decision whether to use UP-MP or DRGW crews would be a matter solely within the discretion of the management of the railroads. At no point does he indicate that UP-MP employees would have any right to participate in the decision-making process.

Following cross-examination by applicants, the labor parties had the opportunity to cross-examine Mr. Nance. BLF did not question him. Counsel for UTU's cross-examination dealt exclusively with Mr. Nance's projection of the impact of the primary transactions on DRGW's employees. No questions were asked regarding DRGW's assessment of the labor impacts of its sought responsive trackage rights. Transcript at 8555-8.

BLE and UTU submitted evidence and presented witnesses in opposition to the responsive trackage rights applications. Nowhere in these evidentiary presentations did the labor parties indicate that UP-MP employees would have a right to participate in the selection of which railroad's crews would perform trackage rights operations.

On July 3, 1981, BLE submitted the verified statement of Edmund G. Becker in opposition to trackage rights over UP lines. Prepared Statement BLE-1, entered into evidence as BLE-H (VS)-2. Mr. Becker noted that the trackage rights applicants intended to perform operations using their own crews. He testified that granting the responsive applications "would have an adverse effect on the engineers currently handling the traffic received from and delivered to the Missouri-Kansas-Texas Railroad at Kansas City [and] . . . it would be safe to say that no less than two hundred-sixty (260) engineers would be affected due to the ripple effect. . . ." BLE-H(VS) 2, at 4. The verified statement does not suggest that UP engineers would have any protection from these adverse consequences under any collective bargaining agreements or the RLA. Further, on cross-examination, Mr. Becker did not indicate that UP engineers would have any right to

participate in trackage rights work force selection. Rather, he testified that UP engineers would be adversely affected by approval of the responsive applications. Transcript, at 12, 974-81, September 16, 1981.

On August 31, 1981, the parties identified as Various Labor Organizations, including UTU, submitted verified statements (VLO-H(VS)-2). Representatives of UTU provided verified statements included in VLO-H(VS)-2. None of those statements, however, contain testimony supporting the assertion that UP-MP employees would have any right to participate in the trackage rights crew selection process.

Finally, in their post-hearing briefs neither UTU nor BLE made any arguments or cite any evidence in support of the positions they now advocate. The brief for Various Labor Organizations, in its statement of facts, cites Mr. Nance's testimony regarding labor impact of the consolidation, with and without approval of DRGW's trackage rights application. Thus, the brief filed on behalf of UTU accepts labor impact evidence which assumes that trackage rights operations would be performed by the tenant using its own crews. BLE's brief does not discuss the labor impacts of the responsive trackage rights. Rather, it merely made reference to BLE-H (VS)-2 on that point. Thus, the record contains no evidence to support the contention of UTU and BLE that UP-MP employees have rights under collective bargaining agreements to participate in the trackage rights crew selection process.

Further, petitioners' argument regarding the alleged unilateral change of working conditions mischaracterizes the nature of the trackage rights operations. BLE and UTU have cited decisions such as *St. Louis Southwestern Ry. Co.* v. *Broth. of Railroad Signalmen*, 665 F.2d 987 (10th Cir. 1981) for the proposition that railroads cannot transfer or contract out work which, under collective bargaining agreements and by custom, is to be done by their own employees. These decisions are not relevant with respect to the trackage rights crew assignments in issue here. We approved the MKT and DRGW trackage rights applications to ameliorate certain anticompetive impacts of the UP-MP consolidation. Those trackage rights operations will be conducted in competition with UP-MP operations. MKT and DRGW will be handling traffic for their own accounts not for UP-MP. UP-MP

has not transferred or contracted out any work by agreeing to the trackage rights as a condition to the consolidation.

BLE and UTU both contend that our decision denying BLE's petition for clarification is inconsistent with our general policy of not injecting the Commission into labor disputes. In support, petitioners cite Finance Docket No. 28046, *Illinois Central Gulf R. Co.-Trackage Rights-Over Chicago & I.M. RY. Co.* (not printed), served February 22, 1977 and Finance Docket No. 30138, *Cairo Terminal Railroad Co.-Trackage Rights Exemption-Illinois C.G. R. Co.* (not printed), served May 17, 1983.

In *Illinois Central Gulf*, the Commission approved a trackage rights agreement which included a provision that the trackage rights tenant would perform operations using its own crews. UTU filed a petition for reconsideration asserting that the Commission had no authority to impose a crew assignment condition and requesting that the condition be removed. The Commission, Division 3, dismissed the petition for reconsideration finding that the crew assignment provision of the agreement was not a condition imposed by the Commission pursuant to the section of the Interstate Commerce Act now codified as 49 U.S.C. 11347. Rather, the provision was a negotiated agreement between the railroads. The provision was approved (and thus immunized it from all other laws) because it would have no adverse transportation effects. The Division noted that the Review Board, in approving the trackage rights, declined jurisdication over all *other* subject matters and the Division concluded that the Commission has no jurisdiction to impose or to remove crew assignment provisions.

UTU and BLE ask us for the same relief the Commission denied in *Illinois Central Gulf*. The Commission has the power to approve (and to immunize from other laws) crew assignment provisions in trackage rights agreements. These provisions are not labor conditions and cannot be removed or modified in the manner applicable to labor conditions.

In *Cairo Terminal*, the involved railroads sought an exemption for a proposed trackage rights agreement. The agreement contained a provision regarding which carrier's employees would perform the trackage rights operations. UTU protested the exemption request and requested that the Commission expressly disclaim jurisdiction over the crew assignment provision. UTU's argument was not considered

because the Commission's action in that proceeding was based on 49 U.S.C. 10505, not on 49 U.S.C. 11344 relating to approval of trackage rights agreements. The decision noted, however, that "Crew assignment provisions in trackage rights agreements are within this Commission's subject matter jurisdiction to the extent they relate to the transportation effects of the proposed transaction." Slip op., at 8.

Trackage rights agreements are considered under the criteria of 49 U.S.C. 11344 and if those criteria are met, the agreement is approved. The approval confers self-executing immunity on all material terms of the agreement from all other law to the extent necessary to permit implementation of the agreement. To the extent employees are adversely affected by the transaction they are entitled to benefits under the conditions imposed pursuant to 49 U.S.C. 11347.

Provisions of trackage rights agreements designating which carrier's employees will perform trackage rights operations are material terms of the agreement and may be implemented without any other approval. Further, the agreement is exempted from any requirements of law that could frustrate implementation of the trackage rights agreement as approved, including the crew assignment provision.

This action will not significantly affect either the quality of the human environment or energy consumption.

It is ordered:

1. The petitions of BLE and UTU for reconsideration are denied.

2. This decision shall be effective on the date it is served.

By the Commission, Chairman Taylor, Vice Chairman Sterrett, Commissioners Andre and Gradison.

(SEAL)

Agatha L. Mergenovich
Secretary

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 83-2290

Brotherhood of Locomotive Engineers

v.

Interstate Commerce Commission and
United States of America
And Consolidated Case No. 83-2317

BEFORE: Wright and Mikva, Circuit Judges; and MacKinnon, Senior Circuit Judge

ORDER

Upon consideration of the unopposed joint motion of respondents Interstate Commerce Commission and United States of America for further stay of mandate, it is

ORDERED, by the Court, that the motion is granted and the Clerk is directed to withhold issuance of the mandate through October 9, 1985.

Per Curiam
FOR THE COURT
GEORGE A. FISHER, CLERK

BY:
Robert A. Bonner
Chief Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 83-2290

Brotherhood of Locomotive Engineers

v.

Interstate Commerce Commission and
United States of America
And Consolidated Case No. 83-2317

BEFORE: Wright and Mikva, Circuit Judges; and MacKinnon, Senior Circuit Judge

ORDER

Upon consideration of the joint motion of respondents Interstate Commerce Commission and United States of America for further stay of mandate through November 8, 1985, it is

ORDERED, by the Court, that the motion is granted and the Clerk is directed to withhold issuance of the mandate through November 8, 1985.

Per Curiam

FOR THE COURT
GEORGE A. FISHER, CLERK

BY:
Robert A. Bonner
Chief Deputy Clerk

Circuit Judge Mikva would deny the motion.

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 83-2290

Brotherhood of Locomotive Engineers
and United Transportation Union

v.

Interstate Commerce Commission and
United States of America
And Consolidated Case No. 83-2317

BEFORE: Wright and Mikva, Circuit Judges; and MacKinnon, Senior Circuit Judge

ORDER

Upon consideration of the petitions for rehearing of the various parties, it is

ORDERED, by the Court, that the petitions are denied.

Per Curiam

FOR THE COURT
GEORGE A. FISHER, CLERK

BY:
Robert A. Bonner
Chief Deputy Clerk

Senior Circuit Judge MacKinnon would grant the petitions for rehearing.

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 83-2290

Brotherhood of Locomotive Engineers

v.

Interstate Commerce Commission and
United States of America
And Consolidated Case No. 83-2317

BEFORE: Robinson, Chief Judge; Wright, Tamm, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges

ORDER

The suggestions for rehearing *en banc* of the various parties have been circulated to the full Court and a majority of the judges in regular active service have not voted in favor thereof. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the suggestions for rehearing *en banc* are denied.

Per Curiam

FOR THE COURT
GEORGE A. FISHER, CLERK

BY:
Robert A. Bonner
Chief Deputy Clerk

Circuit Judge Starr would grant the suggestions for rehearing *en banc*.

APPENDIX H

45 U.S.C. §156

§156. Procedure in changing rates of pay, rules, and working conditions

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by Section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

APPENDIX I

49 U.S.C. §11341

§11341. Scope of authority

(a) The authority of the Interstate Commerce Commission under this subchapter is exclusive. A carrier or corporation participating in or resulting from a transaction approved by or exempted by the Commission under this subchapter may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority. A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction. However, if a purchase and sale, a lease, or a corporate consolidation or merger is involved in the transaction, the carrier or corporation may carry out the transaction only with the assent of a majority, or the number required under applicable State law, of the votes of the holders of the capital stock of that corporation entitled to vote. The vote must occur at a regular meeting, or special meeting called for that purpose, of those stockholders and the notice of the meeting must indicate its purpose.

(b) A power granted under this subchapter to a carrier or corporation is in addition to and changes its power under its Corporate Charter and under State law. Action under this subchapter does not establish or provide for establishing a corporation under the laws of the United States.

APPENDIX J

49 U.S.C. §11343

§11343. Consolidation, merger, and acquisition of control

(a) The following transactions involving carriers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I (except a pipeline carrier), II, or III of chapter 105 of this title may be carried out only with the approval and authorization of the Commission:

(1) consolidation or merger of the properties or franchises of at least 2 carriers into one corporation for the ownership, management, and operation of the previously separately owned properties.

(2) a purchase, lease, or contract to operate property of another carrier by any number of carriers.

(3) acquisition of control of a carrier by any number of carriers.

(4) acquisition of control of at least 2 carriers by a person that is not a carrier.

(5) acquisition of control of a carrier by a person that is not a carrier but that controls any number of carriers.

(6) acquisition by a rail carrier of trackage rights over, or joint ownership in or joint use of, a railroad line (and terminals incidental to it) owned or operated by another rail carrier.

(b) A person may carry out a transaction referred to in subsection (a) of this section or participate in achieving the control or management, including the power to exercise control or management, in a common interest of more than one of those carriers, regardless of how that result is reached, only with the approval and authorization of the Commission under this subchapter. In addition to other transactions, each of the following transactions are considered achievements of control or management:

(1) A transaction by a carrier has the effect of putting that carrier and persons affiliated with it, taken together, in control

49 U.S.C. §11343 (cont'd)

of another carrier.

(2) A transaction by a person affiliated with a carrier has the effect of putting that carrier and persons affiliated with it, taken together, in control of another carrier.

(3) A transaction by at least 2 persons acting together (one of whom is a carrier or is affiliate with a carrier) has the effect of putting those persons and carriers and persons affiliated with any of them, or with any of those affiliated carriers, taken together, in control of another carrier.

(c) A person is affiliated with a carrier under this subchapter if, because of the relationship between that person and a carrier, it is reasonable to believe that the affairs of another carrier, control of which may be acquired by that person, will be managed in the interest of the other carrier.

(d) (1) Approval and authorization by the Commission are not required if the only parties to a transaction referred to in subsection (a) of this section are motor carriers providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title and the aggregate gross operating revenues of those carriers were not more than $2,000,000 during a period of 12 consecutive months ending not more than 6 months before the date of the agreement of the parties covering the transaction. However, the approval and authorization of the Commission is required when a motor carrier that is controlled by or affiliated with a carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter is a party to the transaction.

(2) The approval and authorization of the Commission are not required if the only parties to a transaction referred to in subsection (a) of this section are street, suburban, or interurban electric railways that are not controlled by or under common control with a carrier that is operated as part of a general railroad system of transportation.

(e)(1) Notwithstanding any provisions of this title, the Interstate Commerce Commission, in a matter related to a motor carrier of

49 U.S.C. §11343 (cont'd)

property providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title, may exempt a person, class of persons, transaction, or class of transactions from the merger, consolidation, and acquisition of control provisions of this subchapter if the Commission finds that—

(A) the application of such provisions is not necessary to carry out the transportation policy of Section 10101 of this title; and

(B) either (i) the transaction is of limited scope, or (ii) the application of such provisions is not needed to protect shippers from the abuse of market power.

(2) At least 60 days before any transaction exempt under this subsection from the merger, consolidation, and acquisition of control provisions of this subchapter may take effect, each carrier intending to participate in such transaction shall file with the Commission a notice of its intention to participate in such transaction and shall give public notice of such intention. The Commission shall prescribe the information to be contained in such notices, including the nature and scope of the transaction.

(3) The Commission, on its own initiative or on complaint, may revoke an exemption granted under this subsection, to the extent it specifies, when it finds that application of the provisions of this section to the person, class of persons, or transportation is necessary to carry out the transportation policy of Section 10101 of this title.

(4) If the Commission, on its own initiative, finds that employees of any carrier intending to participate in a transaction exempt under this subsection from the merger, consolidation, and acquisition of control provisions of this subchapter are or will be adversely affected by such transaction or if employees of such carrier adversely affected by such transaction file a complaint concerning such transaction with the Commission, the Commission shall revoke such exemption to the extent the Commission deems necessary to review and address the adverse effects of such employees.

APPENDIX K

49 U.S.C. §11344

§11344. Consolidation, merger, and acquisition of control: general procedure and conditions of approval

(a) The Interstate Commerce Commission may begin a proceeding to approve and authorize a transaction referred to the in Section 11343 of this title on application of the person seeking that authority. When an application is filed with the Commission, the Commission shall notify the chief executive officer of each State in which property of the carriers involved in the proposed transaction is located and shall notify those carriers. If a motor carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title is involved in the transaction, the Commission must notify the persons specified in Section 10328(b) of this title. The Commission shall hold a public hearing when a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter is involved in the transaction unless the Commission determines that a public hearing is not necessary in the public interest.

(b)(1) In a proceeding under this section which involves the merger or control of at least two class I railroads, as defined by the Commission, the Commission shall consider at least the following:

(A) the effect of the proposed transaction on the adequacy of transportation to the public.

(B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

(C) the total fixed charges that result from the proposed transaction.

(D) the interest of carrier employees affected by the proposed transaction.

(E) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region.

49 U.S.C. §11344 (cont'd)

(2) In a proceeding under this section which involves only carriers of passengers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter II of chapter 105 of this title, the Commission shall consider at least the following:

(A) the effect of the proposed transaction on the adequacy of transportation to the public.

(B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

(C) the total fixed charges that result from the proposed transaction.

(D) the interest of carrier employees affected by the proposed transaction.

(c) The Commission shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest. The Commission may impose conditions governing the transaction. When the transaction contemplates a guaranty or assumption of payment of dividends or of fixed charges or will result in an increase of total fixed charges, the Commission may approve and authorize the transaction only if it finds that the guaranty, assumption, or increase is consistent with the public interest. When a rail carrier, or a person controlled by or affiliated with a rail carrier, is an applicant and the transaction involves a motor carrier, the Commission may approve and authorize the transaction only if it finds that the transaction is consistent with the public interest, will enable the rail carrier to use motor carrier transportation to public advantage in its operations, and will not unreasonably restrain competition. When a rail carrier is involved in the transaction, the Commission may require inclusion of other rail carriers located in the area involved in the transaction if they apply for inclusion and the Commission finds their inclusion to be consistent with the public interest.

(d) In a proceeding under this section which does not involve the merger or control of at least two class I railroads, as defined by

49 U.S.C. §11344 (cont'd)

the Commission, the Commission shall approve such an application unless it finds that—

(1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and

(2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

In making such findings, the Commission shall, with respect to any application that is part of a plan or proposal developed under section 5(a)-(d) of the Department of Transportation Act (49 U.S.C. 1654 (a)-(d)), accord substantial weight to any recommendations of the Secretary of Transportation. The provisions of this subsection do not apply to any proceeding under this section which involves only carriers of passengers providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title.

(e) A rail carrier, or a person controlled by or affiliated with a rail carrier, together with one or more affected shippers, may apply for approval under this subsection of a transaction for the purpose of providing motor carrier transportation prior or subsequent to rail transportation to serve inadequately served shippers located on a railroad other than the applicant carrier. Such application shall be approved by the Commission if the applicants demonstrate presently impaired rail service and inadequate motor common carrier service which results in the serious failure of the rail carrier serving the shippers to meet the rail equipment or transportation schedules of shippers or seriously to fail otherwise to provide adequate normal rail services required by shippers and which shippers would reasonably expect the rail carrier to provide. The Commission shall approve or disapprove applications under this subsection within 30 days after receipt of such application. The Commission shall approve applications which are not protested by interested parties within 30 days following receipt of such application.

APPENDIX L

49 U.S.C. §11347

§11347. Employee protective arrangements in transactions involving rail carriers

When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interest of employees who are affected by the transaction as the terms established under this section before February 5, 1976, and the terms established under section 565 of title 45. Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period).

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Nos. 85-792, 85-793

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

INTERSTATE COMMERCE COMMISSION AND
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
Petitioners,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND
UNITED TRANSPORTATION UNION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENTS UNION PACIFIC RAILROAD COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY IN SUPPORT OF PETITIONS

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BRIEF OF RESPONDENTS UNION PACIFIC RAILROAD COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY IN SUPPORT OF PETITIONS

Respondents Union Pacific Railroad Company and Missouri Pacific Railroad Company (collectively "UP/MP"), intervenors in the court below, submit this brief in support of the petitions for certiorari filed by the Interstate Commerce Commission and the Missouri-Kansas-Texas Railroad Company ("MKT").

Union Pacific and Missouri Pacific support the petitions notwithstanding the fact that their interests in this dispute appear to conflict with those of petitioner MKT. UP/MP are the "landlords" of the trackage rights at issue below; the relief sought by the unions would allow UP/MP employees to

participate in the selection of crews to operate the trains of UP/MP's tenant and competitor, MKT. As Judge MacKinnon recognized below (MKT Pet., A32-33), affording one railroad's employees a right to participate in selecting the crews to operate its competitors' trains would be not only unprecedented, but it would also create significant competitive and labor problems in the railroad industry. For that reason, UP/MP have supported MKT's position throughout these proceedings.

The chaos and confusion caused by the decision below is illustrated by the unions' threat to strike Missouri Pacific because of MKT's decision to exclude UP/MP employees from the process of selecting crews to operate MKT's trains. See *generally Missouri Pacific Railroad Co.* v. *United Transportation Union*, 580 F. Supp. 1490 (E.D. Mo. 1984), *appeal pending*, No. 84-1465 (8th Cir.). The unions' strike notice, which purported to be based on rights afforded by the Railway Labor Act, threatened to abrogate the public interest benefits of a transaction approved by the ICC under the Interstate Commerce Act, as well as the public interest in maintaining the uninterrupted flow of interstate commerce. —

Such public interest concerns and considerations surely shaped Congress' intent in enacting the Interstate Commerce Act, the language and legislative history of which make unambiguously clear that transactions approved by the ICC are exempt "from all other law . . . necessary to let that person carry out the transaction . . . ." 49 U.S.C. § 11341(a). Recognition of that unambiguous statutory language—and of its application to the Railway Labor Act—is reflected in decisions of the Sixth and Eighth Circuit Courts of Appeals, with which the decision below squarely conflicts. See *Brotherhood of Locomotive Engineers* v. *Chicago and North Western Railway*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963); *Nemitz* v. *Norfolk & Western Railway*, 436 F.2d 841 (6th Cir.), *aff'd on other grounds*, 404 U.S. 37 (1971).

To resolve the conflict among the Circuits created by the decision below, and to prevent the regulatory confusion and industry chaos that the D.C. Circuit Court's decision would entail, this Court should grant the ICC and MKT petitions.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petitions of the Interstate Commerce Commission and the Missouri-Kansas-Texas Railroad Company, we respectfully urge the Court to issue the requested writ of certiorari to review the decision of the D.C. Circuit below.

Respectfully submitted,

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APPENDIX

Set forth below, pursuant to Rule 28.1, is a list of all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of Respondents Union Pacific Railroad Company and Missouri Pacific Railroad Company:

The Alton & Southern Railway Company
Arkansas & Memphis Railway Bridge and Terminal Company
The Belt Railway Company of Chicago
Brownsville & Matamoros Bridge Company
Camas Prairie Railroad Company
Chicago and Western Indiana Railroad Company
The Denver Union Terminal Railway Company
Galveston, Houston and Henderson Railway Company
Great Southwest Railroad, Inc.
Houston Belt & Terminal Railway Company
Jefferson Southwestern Railroad Company
Kansas City Terminal Railway Company
Longview Switching Company
Portland Traction Company
Portland Terminal Railroad Company
The St. Joseph and Grand Island Railway Company
St. Joseph Terminal Railroad Company
Southern Illinois and Missouri Bridge Company
Terminal Industrial Land Company
Terminal Railroad Association of St. Louis
Texas City Terminal Railway Company
Trailer Train Company

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No. 85-793

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,

Petitioner,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND UNITED TRANSPORTATION UNION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Supplemental Brief of Petitioner Missouri-Kansas-Texas Railroad Company

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IN THE

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OCTOBER TERM, 1985

No. 85-793

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
Petitioner,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND UNITED TRANSPORTATION UNION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Supplemental Brief of Petitioner Missouri-Kansas-Texas Railroad Company

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Introduction

On November 7, 1985, Missouri-Kansas-Texas Railroad Company ("MKT") filed a petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit requesting this Court to review a decision vacating two orders of the Interstate Commerce Commission ("ICC"). *Brotherhood*

of Locomotive Eng'rs v. ICC, 761 F.2d 714 (D.C. Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3359 (U.S. Nov. 7, 1985) (No. 85-792) ("*BLE v. ICC*"). In the decision below, the court of appeals remanded the case to the ICC because ICC, when it approved MKT's trackage rights application to operate with its own crews over the lines of the Missouri Pacific Railroad Company ("MP") as a condition to ICC's approval of the merger of Union Pacific Railroad Company ("UP"), Missouri Pacific Railroad Company, and Western Pacific Railroad Company, failed to make specific findings under 49 U.S.C. § 11341(a) that MKT's decision to use its own crews was necessary to effectuate the transaction. In the absence of such findings, the court of appeals ruled that ICC could not exempt MKT and MP from the requirements of the Railway Labor Act (45 U.S.C. § 156) (MKT Petition, A15-17).

As indicated in MKT's petition for writ of certiorari, respondent United Transportation Union ("UTU") reacted to ICC's decision authorizing MKT to use its own crews and MP's refusal to bargain over this issue by attempting to strike MP (MKT Petition, at 5). The strike was enjoined by the United States District Court for the Eastern District of Missouri, *Missouri Pacific R.R. v. United Transp. Union*, 580 F. Supp. 1490 (E.D. Mo. 1984), and UTU appealed the decision to the United States Court of Appeals for the Eighth Circuit (Case No. 84-1465).

On January 15, 1986, the Eighth Circuit affirmed the decision of the district court enjoining UTU's strike. *Missouri Pacific R.R. v. United Transp. Union*, No. 84-1465 Slip op. (8th Cir. Jan. 15, 1986), reproduced as Appendix A to this Supplemental Brief ("*MP*

v. UTU"). In that decision, the Eighth Circuit adopted the following reasoning of the district court:

> [Railway Labor Act] § 156 imposes a duty on carriers to negotiate over certain "major" disputes. 45 U.S.C. § 156. It is easy to see why it is necessary that MOPAC [MP] be exempted from that duty, insofar as it relates to UTU's demand that MOPAC negotiate over the selection of forces to operate KATY [MKT] trains on MOPAC lines. There is nothing that UTU/MOPAC negotiations could do to change the crew selection provisions approved by the ICC. Under the [Interstate Commerce Act] the ICC has authority to approve the transactions, including trackage rights agreements, between carriers. 49 U.S.C. § 11341 *et seq.* Here the ICC expressly and emphatically stated that "[p]rovisions of trackage rights agreements designating which carrier's employees will perform trackage rights operations are material terms of the agreement and *may be implemented without further approval.*" F.D. No. 30,000 (Sub-No. 18) *et al.*, (October 19, 1983), at 15 (emphasis added). *See Finding of Fact No. 23.* MOPAC cannot unilaterally change a material term of a trackage rights agreement approved by the ICC and therefore MOPAC was immune from any requirement of the RLA to negotiate over such a material term.

(A9).[1]

[1]UTU has filed a petition for writ of certiorari requesting this Court to review *MP v. UTU* (No. 85-1054).

The Eighth Circuit's Decision in *Missouri Pacific R.R. Co. v. United Transp. Union* Constitutes Additional Justification for Granting the Writ

The Eighth Circuit's decision in *MP v. UTU* is in direct conflict with *BLE v. ICC*. As stated above, the essential underpinning of the D.C. Circuit's opinion in *BLE v. ICC* was that ICC failed to make specific findings that MKT's decision to utilize its own crews was necessary to enable it to effectuate the transaction and, therefore, justified an exemption for MKT and MP, pursuant to 49 U.S.C. § 11341(a), from any obligation to bargain with UTU over this issue, as they otherwise might be required to do under the Railway Labor Act (MKT Petition, A15-17). In *MP v. UTU*, the Eighth Circuit found the same ICC orders sufficient to cause an exemption from the Railway Labor Act to apply under 49 U.S.C. § 11341(a) (A9-12). For this reason, as well as for the other reasons set forth in MKT's petition at pp. 13-15, the Court

should exercise its power of supervision to resolve the conflict of authority among the circuits.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 84-1465

MISSOURI PACIFIC RAILROAD COMPANY AND MISSOURI-KANSAS-TEXAS RAILROAD CO.,

Appellees,

v.

UNITED TRANSPORTATION UNION; GENERAL COMMITTEE OF ADJUSTMENT; I. NEWCOMB; K.R. GUETHLE; R.D. HOGAN; W.J. SHELTON; RICHARD L. HELMS; T.K. ARTHUR; R.W. BRETCH; R.P. SHOCKLEE; B.J. BENNETT; K.R. MENGES; J.E. QUEATHEM AND K.M. DANNEMAN,

Appellants.

Appeal from the United States District Court for the Eastern District of Missouri

---

Submitted: January 14, 1985

Filed: January 15, 1986

Before BRIGHT, Senior Circuit Judge, ARNOLD and BOWMAN, Circuit Judges.

PER CURIAM.

Appellants (United Transportation Union (UTU), its General Committee of Adjustment, and certain of its agents and officers) ask us to vacate the permanent injunction entered by the District Court[1] barring them and those in active concert or participation with them from striking, picketing, and other specified actions. The injunction is limited to actions against Missouri Pacific Railroad Company (MOPAC) as a result of the operation of Missouri-Kansas-Texas Railroad Company (KATY) trains over MOPAC tracks under trackage rights granted to KATY by the Interstate Commerce Commission (ICC). We affirm.

The ICC granted KATY the trackage rights in question, over MOPAC's opposition, as a condition of the ICC's approval of the consolidation of MOPAC with Union Pacific Railroad Company. *See Union Pacific Corp.*, 366 I.C.C. 459 (1982), *aff'd sub nom. Southern Pacific Transportation Co. v. ICC*, 736 F.2d 708 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1171 (1985). This consolidation was effected in December 1982. Early in January 1983 KATY, using its own employees, began operations over MOPAC tracks in accordance with the ICC's decision.

UTU sought to have MOPAC require KATY to use MOPAC crews in conducting its trackage rights operations. MOPAC took the position that the ICC had given KATY the right to use it own crews in those operations, and therefore that the matter was out of MOPAC's hands. KATY, for its part, entered into agreements with its own UTU employees to operate its trains in the implementation of its trackage rights

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[1]The Honorable John F. Nangle, United States District Judge to the Eastern District of Missouri.

over MOPAC tracks as authorized by the ICC. By Mailgram dated March 28, 1983, UTU threatened to strike MOPAC beginning April 4, 1983 if arrangements were not made "to halt this trespass on our collectively bargained agreements and our seniority by non-Missouri Pacific employees . . . ." Stipulations, Appendix I.

On March 30, 1983, MOPAC initiated the present litigation by filing its complaint under the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, and the Interstate Commerce Act, 49 U.S.C. § 11341 *et seq.*, seeking declaratory and injunctive relief against the threatened strike. On the same date, the District Court entered a temporary restraining order prohibiting implementation of UTU's strike threat.

On May 20, 1983, UTU filed counterclaims against MOPAC and KATY, which had intervened as a plaintiff, challenging KATY's use of KATY crews to operate KATY trains in trackage rights service. UTU alleged that KATY's trackage rights operations violated an "actual and objective rule and working condition" governing MOPAC employees, asserting the existence of a requirement that "trains operating over trackage owned by MoPac . . . be manned by MoPac crews." Designated Record at 33, ¶¶ 8, 9. UTU also contended that MOPAC and KATY had violated certain notice and negotiation conditions of the ICC's approval of KATY's trackage rights. Both of these issues, as well as issues raised by MOPAC's complaint, subsequently were presented by UTU directly to the ICC. On June 29, 1983, UTU filed a petition for clarification in which it asked the ICC to rule

> [T]hat its prior orders (1) did not select the forces to perform the trackage rights oper-

> ations, (2) did not relieve the carriers of their obligations under the Railway Labor Act to avoid unilateral changes of working conditions, and (3) did not relieve the carriers of their obligations to comply with the notice and negotiation provisions of the employee protective provisions imposed in the sub-proceedings at bar to protect the interests of MP employees affected by those transactions.

Missouri Pacific Railroad Co. v. United Transportation Union, 580 F. Supp. 1490, 1497 (E.D. Mo. 1984).

A few months later the ICC issued a decision rejecting all three of UTU's arguments regarding the selection of crews. *See Denver & Rio Grande Western Railroad Co.*, I.C.C. Finance Docket No. 30,000 (Sub-No. 18 *et al.*) (October 19, 1983) (unpublished), *reprinted in* Brief for Appellants, Appendix I. The ICC held that (a) "trackage rights agreements do not involve a change in UP-MP employees working conditions," *id.* at 5; (b) MOPAC's employees have "no right to participate in the trackage rights crew selection process," *id.* at 4-5; and (c) pursuant to 49 U.S.C. § 11341, the ICC's approval of KATY's trackage rights applications exempted MOPAC and KATY from any inconsistent requirements of the Railway Labor Act or their collective bargaining agreements, *id.* at 15.

Soon thereafter the parties filed cross-motions for summary judgment. On March 1, 1984, the District Court issued a memorandum opinion, 580 F. Supp. 1490 (E.D. Mo. 1984), explaining in detail the basis for its February 7, 1984 preliminary injunction and

granting in part the railroads' motions for summary judgment. The District Court made detailed findings of fact, including a finding that the strike threatened by UTU would cause irreparable injury to MOPAC and to the thousands of shippers it serves. In its conclusions of law, the District Court held that (a) the dispute between MOPAC and UTU is a "minor" dispute within the meaning of the Railway Labor Act, and, therefore, section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, does not bar a labor injunction; (b) alternatively, if this is a "major" dispute within the meaning of the Railway Labor Act, the threatened strike would be illegal because the ICC has exempted the railroads from any duty to negotiate with appellants concerning crew selection for KATY's trackage rights, and section 4 of the Norris-LaGuardia Act must give way to the ICC's power to determine labor disputes in connection with consolidation and trackage rights proceedings; and (c) section 8 of the Norris-LaGuardia Act, 29 U.S.C. § 108, does not prevent the issuance of a preliminary injunction because plaintiffs have not violated its provisions. 580 F. Supp. at 1499-1506.

On March 30, 1984, the District Court entered its permanent injunction against the threatened strike, and issued an accompanying memorandum which, *inter alia*, denied UTU's motion to exclude from the scope of the injunction the individual union members. D.R. at 139-45.

Meanwhile, UTU and another union, the Brotherhood of Locomotive Engineers, petitioned the United States Court of Appeals for the District of Columbia Circuit to vacate the ICC orders granting KATY the right to use its own crews in trackage rights service

and exempting under 49 U.S.C. § 11341(a) these crew selection prerogatives from the Railway Labor Act and other laws. On May 3, 1985 (several months after oral argument had been heard on the appeal in the instant case) the District of Columbia Circuit handed down its decision. *Brotherhood of Locomotive Engineers v. ICC*, 761 F.2d 714 (D.C. Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3359 (U.S. Nov. 7, 1985) (No. 85-792). In a two-to-one decision, the D.C. Circuit panel held that the ICC had failed to show that the exemption from the Railway Labor Act respecting crew selection was necessary. Accordingly, the court vacated the ICC orders relied upon by the railroads and left the parties to their Railway Labor Act remedies. A petition for rehearing and suggestions for rehearing en banc were filed, and on July 12, 1985, the D.C. Circuit *sua sponte* amended its opinion so that instead of leaving the parties to their Railway Labor Act remedies the court remanded the case to the ICC, giving the ICC the opportunity to exercise its exemption authority by explaining "why termination of the asserted right to participate in crew selection is necessary to effectuate the pro-competitive purpose of the grant of trackage rights or some other purpose sufficiently related to the transaction." *Id.* at 725. The opinion thus having been amended, the petition for rehearing and suggestions for rehearing en banc were denied on August 9, 1985.

The ICC then petitioned the Supreme Court for a writ of certiorari; the Court has not yet ruled on the petition, and the D.C. Circuit, which first stayed its mandate and then eventually issued it on November 12, 1985, recalled its mandate on November 18, 1985 pending the Supreme Court's action. The ICC orders

relied upon by MOPAC and KATY, and by the District Court, are thus still in force.

On December 23, 1985, appellants filed a petition for a writ of certiorari requesting the Supreme Court, if it grants review of the D.C. Circuit case, to review the present case before judgment by our Court. The Supreme Court has not yet acted upon this petition. We could hold our decision in abeyance during the pendency of the petition, or proceed to issue it now. For whatever assistance it may be to the parties and to the progress of the litigation, we issue it now.

As the District Court correctly noted, if a dispute is minor and cannot be resolved by the normal grievance procedure, the parties must submit their differences to the National Railroad Adjustment Board, the jurisdiction of which is exclusive. *See Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320 (1972). It follows that a strike over minor disputes violates the Railway Labor Act and may be enjoined by a federal district court, notwithstanding the prohibitions of the Norris-LaGuardia Act. *See Brotherhood of Locomotive Engineers v. Louisville & Nashville Railroad Co.*, 373 U.S. 33 (1963); *Chicago and Northwestern Transportation Co. v. United Transportation Union*, 656 F.2d 274, 277 (7th Cir. 1981). On the other hand, the Norris-LaGuardia Act prevents the issuance of an injunction against a railway labor strike over a major dispute, since the Railway Labor Act requires only that the parties negotiate major disputes and "does not provide a process for a final decision like that of the Adjustment Board in a 'minor dispute' case." *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co.*, 353 U.S. 30, 42 n.24 (1957). The District Court further noted correctly that

the essential test is whether the dispute "evolv[es] from the bargaining process for a new or altered contract" (major dispute) or whether the dispute is "over the meaning of an existing collective bargaining agreement" (minor dispute). 580 F. Supp. at 1500 (quoting *Chicago and Northwestern Transportation*, 656 F.2d at 277-78). The District Court then relied upon the strike threat Mailgram from UTU for the conclusion that the instant dispute is a minor rather than a major one. As previously mentioned, UTU's Mailgram demanded a halt to MOPAC's "trepass on our collectively bargained agreements and our seniority." Based thereon, the District Court concluded that the dispute was "reasonably susceptible to resolution by reference to the contracts between the parties." 580 F. Supp. at 1500.

Appellants contend that the District Court's resolution of the "minor dispute" question on motions for summary judgment was inappropriate because there was a factual dispute as to the underlying reasons for the threatened strike. Appellants submitted an affidavit to show that the dispute involved unsuccessful efforts to negotiate modifications to existing working conditions, and thus that the dispute was a major dispute. We agree with appellants that the affidavit created a factual issue sufficient to preclude summary judgment on the "minor dispute" ground. *See* Fed. R. Civ. P. 56(c).

Our conclusion that the District Court erred in ruling the dispute a minor dispute on motions for summary judgment is not, however, the end of the matter, for the court also held, as an alternative basis for its decision, that even if the dispute is a major dispute the Norris-LaGuardia Act does not bar a labor in-

junction in this case. In a carefully reasoned opinion the District Court held that MOPAC is exempted under § 11341(a) of the Interstate Commerce Act (ICA), 49 U.S.C. § 11341(a), from the requirements of the Railway Labor Act (RLA) with respect to major disputes. We quote from the District Court's opinion:

> RLA § 156 imposes a duty on carriers to negotiate over certain "major" disputes. 45 U.S.C. § 156. It is easy to see why it is necessary that MOPAC be exempted from that duty, insofar as it relates to UTU's demand that MOPAC negotiate over the selection of forces to operate KATY trains on MOPAC lines. There is nothing that UTU/MOPAC negotiations could do to change the crew selection provisions approved by the ICC. Under the ICA the ICC has authority to approve the transactions, including trackage rights agreements, between carriers. 49 U.S.C. § 11341 *et seq.* Here the ICC expressly and emphatically stated that "[p]rovisions of trackage rights agreements designating which carrier's employees will perform trackage rights operations are material terms of the agreement and *may be implemented without further approval.*" F.D. No. 30,000 (Sub-No. 18) *et al.*, (October 19, 1983), at 15 (emphasis added). *See Finding of Fact No. 23.* MOPAC cannot unilaterally change a material term of a trackage rights agreement approved by the ICC and therefore MOPAC was immune from any requirement of the RLA to negotiate over such a material term.

580 F. Supp. at 1502-03 (footnote omitted). In addition, the District Court rejected UTU's argument that it remains free to strike over MOPAC's refusal to negotiate about the selection of forces for KATY trains operating on MOPAC lines. To the contrary, the District Court held that in this case the anti-injunction provisions of the Norris-LaGuardia Act (NLGA) are displaced by the jurisdiction of the ICC under the Interstate Commerce Act. The court's essential reasoning is set forth in the following passage from its opinion:

> In the case at bar the ICC authoritatively resolved the question of which employees may operate KATY's trains over MOPAC lines. The NLGA must be accommodated to this exercise of the ICC's power, because allowing UTU to strike would be tantamount to saying that UTU has carte blanche authority to frustrate and avoid a material term of a consolidation approved by the ICC. Congress did not intend that affected employees have such power to block consolidations which are in the public interest.
>
> Although it is not for this Court to question the wisdom of Congress' action, in this case it is not difficult to see why Congress intended the NLGA to be inapplicable to ICC-resolved, consolidation-related labor disputes. In the case at bar, UTU and other labor representatives participated in the ICC proceedings. *See Finding of Fact No. 6.* UTU does not contend that it did not have adequate opportunities to object to any provision of the transaction, including the trackage

rights agreement, or to seek favorable treatment. UTU either failed to object to the crewing provisions of KATY's trackage rights application or it did object and the ICC rejected its objection. In either case, it is inconceivable that Congress intended that a labor union would be able to participate in ICC approval proceedings and then, if the union was dissatisfied with the result or a part thereof, strike a carrier to obtain the advantage it desired.

Moreover, it is not probable that Congress intended to allow UTU to strike where UTU's objective is to obtain an advantage which MOPAC is now unable to give--the right to operate KATY trains that run over MOPAC lines. If MOPAC gave that right to any of its employees, MOPAC would breach its agreement with KATY and would vary a material term of an agreement approved by the ICC. If UTU obtained its objective by striking, wouldn't KATY employees then be free to strike to obtain the same advantage? To avoid the stifling effects that such economic power would have on any attempt to consolidate railroad operations, Congress vested the ICC with the authority to resolve such disputes during approval proceedings. Affected employees are not left out in the cold, because § 11347 requires the ICC to impose employee protective conditions. 49 U.S.C. § 11347. The balance and efficiency which Congress sought to achieve with this scheme

> would be essentially and materially frustrated if employees were free to strike.

580 F. Supp. at 1505-06 (footnote omitted).

We agree with the reasoning of the District Court on the alternative ground set forth above and believe that the court clearly was correct in permanently enjoining appellants from striking, picketing, and engaging in other forms of concerted action over the crew selection issue already decided by the ICC. We have considered all the arguments raised by appellants and find them to be without merit. Accordingly, we affirm the judgment of the District Court on the basis of that court's well-reasoned opinion.
AFFIRMED.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

[TO BE PUBLISHED.]

APPENDIX B

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

[FILED January 15, 1986]

JUDGMENT

No. 84-1465EM

MISSOURI PACIFIC RAILROAD CO., *Et Al.*,
Appellees,

v.

UNITED TRANSPORTATION UNION; *Et Al.*,
Appellants.

Appeal from the United States District Court for the Eastern District of Missouri

---

This appeal from the United States District Court was submitted on the record of the said district court, briefs of the parties and was argued by counsel.

Upon consideration of the premises it is hereby adjudged and decreed that the judgment of the district court is affirmed in accordance with the opinion of this Court.

January 15, 1986

A true copy.

BEST AVAILABLE COPY

Supreme Court, U.S.
FILED
DEC 6 1985
JOSEPH F. SPANIOL, JR.
CLERK

(4) (3)

Nos. 85-792 and 85-793

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

INTERSTATE COMMERCE COMMISSION and
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
Petitioners,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS and
UNITED TRANSPORTATION UNION,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AND NATIONAL RAILWAY LABOR CONFERENCE AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONS

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IN THE

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INTERSTATE COMMERCE COMMISSION and
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---

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AND NATIONAL RAILWAY LABOR CONFERENCE AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONS

INTEREST OF *AMICI CURIAE*

The Association of American Railroads is the trade association for the nation's railroads. Its members employ approximately 94% of the workers, operate approximately 92% of the trackage, and account for approximately 97% of the freight revenues of all railroads in the United States. The Association represents its member railroads before courts, agencies, and the U.S. Congress when matters of common concern are at issue.

Almost all of the nation's Class I railroads are members of the National Railway Labor Conference. The Conference represents member railroads both in national collective bargaining pursuant to the Railway Labor Act with unions representing their employees and in regard to other labor-management relations problems that are of concern to the railroads generally. In addition, the Conference serves as a clearing house of information regarding, and renders assistance and advice to member railroads concerning, employee protection issues that arise out of mergers and other railroad transactions governed by the Interstate Commerce Act.

This case raises the question whether disputes arising out of rail carrier efforts to implement transactions approved by the Interstate Commerce Commission are to be resolved according to the procedures prescribed by the Interstate Commerce Act, or the procedures prescribed by the Railway Labor Act. The difference between the two Acts on this score is critical. Under the Interstate Commerce Act such disputes are resolved promptly by mandatory, binding arbitration; under the Railway Labor Act they may lead to strikes and other forms of self-help, interfering with interstate commerce and possibly blocking altogether the realization of transactions held to be in the public interest.

The decision of the court of appeals in this case misconstrues the relationship between the two statutes and threatens serious interference with and delay to the ability of railroads to implement not only Commission-approved trackage rights transactions, which is the subject of this case, but also mergers and consolidations that have already been approved or may in the future be approved. As we show below, there is no more important labor relations issue in the railroad industry today than the one involved in this case. The AAR and the NRLC accordingly file this brief in support of a grant of cer-

tiorari.[1] We understand that the unions involved herein, the United Transportation Union and the Brotherhood of Locomotive Engineers, will also seek certiorari, and that one or both of them has been authorized to state that the Railway Labor Executives' Association, which consists of the presidents of all of the major rail unions, supports their efforts in that regard. In short, the industry is united in seeking review so that this Court may determine the proper relationship between the Interstate Commerce Act and the Railway Labor Act in disputes over the implementation of ICC-approved transactions.

STATEMENT

1. The Statutory Framework.

a. The Interstate Commerce Act requires the approval of the Commission before rail carriers can take certain actions or engage in certain transactions, such as rail abandonments (49 U.S.C. § 10903), mergers and consolidations, and acquisitions of trackage rights over another carrier's line. § 11343. With respect to transactions subject to § 11343, the Commission's jurisdiction is "exclusive," and carriers participating in approved transactions are "exempt * * * from all other laws * * * as necessary to let that person carry out the transaction * * *." § 11341(a). In determining whether to grant an application subject to § 11343, the Commission is required to consider, among other things, "the interest of carrier employees affected by the proposed transaction," § 11344(b)(1)(D), and if it approves the application the Commission "shall require the carrier to provide a fair arrangement" to protect employees adversely affected by the transaction. § 11347.

In a series of decisions, the Commission has established the protections to be afforded employees adversely af-

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[1] Written consents from all parties to the filing of this brief have been filed with the Clerk of the Court.

fected as a result of approved rail abandonments,[2] mergers and consolidations and common control transactions,[3] and lease and trackage rights transactions.[4] Under these decisions, an employee who is dismissed from his job or displaced to a lower paying position as a result of the approved transaction will continue to receive, generally for six years, the equivalent of the wage he was earning at the time of the adverse effect; employees must accept available work in order to preserve their protected status; moving expenses are provided if relocation is necessary; transfers of work are subject to "implementing agreement" provisions regarding the allocation of seniority or other rights of affected employees; and arbitration of disputes arising out of carrier efforts to implement approved transactions is mandatory if the carrier and the union representing affected employees do not voluntarily enter into an implementing agreement. See *New York Dock Ry.* v. *United States*, *supra*, 609 F.2d at 94.

b. Efforts to change collective bargaining agreements in the railroad (and airline) industry give rise to so-called "major disputes" under the Railway Labor Act. *Elgin, Joliet & Eastern Ry.* v. *Burley*, 325 U.S. 711, 723 (1945). Because the "major purpose of Congress in passing the Railway Labor Act was 'to provide a machinery to prevent strikes,'" *Texas and New Orleans R.R.* v. *Brotherhood of Railway and Steamship Clerks*, 281 U.S. 548, 565 (1930), the Act requires the parties to such a dispute to follow certain prescribed procedures designed to maximize the possibility of reaching agreement. Those procedures are "purposely long and drawn

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[2] *Oregon Short Line R.R.—Abandonment—Goshen*, 360 I.C.C. 91, 98-102 (1979).

[3] *New York Dock Ry.—Control—Brooklyn Eastern District*, 360 I.C.C. 60, 84-90 (1979), *enforced*, *New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979).

[4] *Norfolk and Western Ry.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified by *Mendocino Coast Ry.—Lease and Operate—California Western R.R.*, 360 I.C.C. 653 (1980).

out," *Railway Clerks* v. *Florida East Coast Ry.*, 384 U.S. 238, 246 (1966), and their exhaustion is "almost an interminable process." *Detroit and Toledo Shore Line R.R.* v. *UTU*, 396 U.S. 142, 149 (1969).[5] At their ultimate conclusion, however, the parties may resort to self-help, including a strike by a union if its demands have not been met. *E.g.*, *Railway Clerks* v. *Florida East Coast Ry.*, *supra*, 384 U.S. at 243-44.

2. The Decisions Below.

In the proceeding below, in order to ameliorate the anticompetitive effect of the merger of the Union Pacific ("UP") and Missouri Pacific ("MP") railroads, the Commission granted two competing carriers—the Missouri-Kansas-Texas ("MKT") and the Denver and Rio Grande Western ("DRGW")—rights to operate their trains over tracks owned by MP. The trackage rights applications submitted to and approved by the Commission stated that the MKT would use its own employees to man its trains, and that the DRGW would have the

---

[5] In *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969), this Court described the Act's "detailed framework to facilitate the voluntary settlement of major disputes":

> "A party desiring to effect a change of rates of pay, rules, or working conditions must give advance written notice. § 6. The parties must confer, § 2 Second, and if conference fails to resolve the dispute, either or both may invoke the services of the National Mediation Board, which may also proffer its services *sua sponte* if it finds a labor emergency to exist. § 5 First. If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding arbitration, which can take place, however, only if both consent. §§ 5 First, 7. If arbitration is rejected and the dispute threatens 'substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President,' who may create an emergency board to investigate and report on the dispute. § 10."

option of doing so. (Pet. App. 62a.)[6] When the tenant carriers exercised the trackage rights authority granted by the Commission, the Brotherhood of Locomotive Engineers ("BLE") and the United Transportation Union ("UTU") protested to the Commission on behalf of the MP employees.[7] They argued that the tenants' use of their own crews amounted to a change in the collective bargaining agreements relating to the working conditions of MP employees; that such a change could be lawfully effected only pursuant to collective bargaining under the RLA; that the Commission has no power under the Interstate Commerce Act to authorize a transaction effecting such a change without resort to the procedures of the RLA; and that if the Commission did have such power it had not adequately explained the reasons for exercising it. (Pet. App. 57a-59a).[8]

The Commission rejected the unions' arguments. It reviewed the record and found that "the approved trackage rights operations" whereby the tenants use their own crews "are not inconsistent with the terms of any collective bargaining agreements * * *." (Pet. App. 61a.) It also concluded that, in any event, the tenants

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[6] "Pet. App." references are to the appendix to the petition of the Interstate Commerce Commission.

[7] Both the BLE and the UTU participated in the initial ICC proceeding, opposing the trackage rights transactions generally and requesting imposition of labor protections; but neither opposed the applications insofar as they would allow the tenants to use their own crews and neither objected on appeal to the approval of that aspect of the applications.

[8] In addition, the UTU threatened to strike the MP unless the MP refused to permit MKT crews to operate MKT trains on MP tracks. That threatened strike was enjoined by the District Court for the Eastern District of Missouri. *Missouri Pac. R.R.* v. *UTU*, 580 F. Supp. 1490 (E.D. Mo. 1984), *pdg. on appeal*, No. 84-1465 (8th Cir.).

were free to use their own crews because, even if that did amount to a change in the working conditions of MP employees, the RLA provisions did not apply for the reasons stated at length in *Brotherhood of Locomotive Engineers* v. *Chicago and North Western Ry.*, 314 F.2d 424, 430-31 (8th Cir. 1963). (Pet. App. 60a.)

Over a dissent by Judge MacKinnon, the court of appeals found the Commission's explanation inadequate. It vacated the Commission's orders on the asserted ground that the agency "did not give a shred of reasoning to support its view that completion of the transactions required shielding crew selection from the Railway Labor Act." (Pet. App. 19a; footnote omitted.)

ARGUMENT

We show below that the court of appeals was wrong in concluding that the Commission did not adequately explain the reasons for its conclusions; that the decision below creates a conflict among the circuits; and that certiorari is warranted in the interest of the orderly administration of justice in the federal courts and to resolve the uncertainty in the rail industry over the role, if any, of the Railway Labor Act in disputes arising from carrier efforts to implement transactions approved by the Commission as being in the public interest.

A. The Commission Adequately Explained Itself.

The Commission's reasoning in its October 19, 1983 decision "may reasonably be discerned." *Bowman Transp., Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285-86 (1974). It set out the issues for decision by stating the unions' claims: "that this Commission has no jurisdiction over crew assignment disputes and that they must be settled under the procedures of the Railway Labor Act" and that the Commission's approval of the trackage rights transaction could not "immunize [that]

transaction from the requirements of the RLA" or authorize the carriers to make "unilateral changes of collective bargaining agreements." (Pet. App. 57a.) The Commission then went on to reject those arguments, ruling that its approval of a transaction covered by § 11343—

> "exempts such a transaction from the requirements of all laws as necessary to permit the transaction to be carried out, and includes an exemption from the requirements of the RLA. *See Brotherhood of Loc. Eng.* v. *Chicago & North Western Ry. Co.*, 314 F.2d 424, 432 (8th Cir. 1963), *cert. denied*, 375 U.S. 819 (1963)." (Pet. App. 59a.)

It also ruled (*id.* 60a):

> "To the extent that existing working conditions and collective bargaining agreements conflict with a transaction which we have approved, those conditions and agreements must give way to the implementation of the transaction."

And then the Commission explained why (*id.*):

> "If our approval of a transaction did not include authority for the railroads to make necessary changes in working conditions, subject to payment of specified benefits, our jurisdiction to approve transactions requiring changes of the working conditions of any employees would be substantially nullified. Such a result would be clearly contrary to congressional intent. The discussion of this point in *Brotherhood of Loc. Eng.* [v. *Chicago and North Western Ry. Co.*], *supra*, at 430-1, is persuasive and we conclude that this reasoning is unaffected by the enactment of the 4-R Act."

The Commission's two citations to the Eighth Circuit's decision in the *Chicago and North Western* case (hereinafter "*BLE* v. *CNW*"), and its adoption of the reasoning there as its own, provide a fully adequate basis for its finding that the crew selection provisions of the approved

trackage rights agreements were exempt from the provisions of the RLA.[9] In that case the defendant carrier had, with the Commission's approval, purchased the properties and operating rights of another carrier, subject to employee protections imposed by the Commission. When the carrier sought to implement the transaction the unions objected, arguing that resort to the RLA major dispute procedures was required. But the court ruled that the RLA had been superseded by the Interstate Commerce Act for purposes of implementing the approved transaction. The court relied, among other things, on the legislative history of the Transportation Act of 1940, which was the source of congressionally imposed employee protective conditions and which amended the Interstate Commerce Act to provide for such protections. In passing that Act Congress rejected a proposed amendment—the "Harrington" amendment—that would have forbidden carriers from abolishing jobs or impairing existing employment rights as a result of a merger or other transaction needing the Commission's approval under § 11343. That amendment, the Eighth Circuit noted, " 'threatened to prevent all consolidations to which it related.' " *Id.* at 430 (quoting *Railway Labor Executives' Ass'n* v. *United States*, 339 U.S. 142, 151 (1950)). Its defeat fortified the conclusion that Congress intended the ICC-prescribed protective conditions rather than the RLA to govern the adjustments caused by merger implementations, for if the RLA were to govern it would allow the nullification of Commission-approved transactions:

---

[9] See *Shepard* v. *NLRB*, 459 U.S. 344, 348-52 (1983), in which this Court upheld the Board's decision to forgo a requirement of reimbursement as a remedy for violation of § 8(e) of the National Labor Relations Act. The Board's reasoning on that issue was confined to a footnote and was "something less than a model of precise expository prose," but the Court was able to glean "the sense of the Board's explanation," in part by a reading of a decision that the Board had merely cited in the explanatory footnote. *Id.* 350.

> "[T]he ICC power to authorize mergers would be completely ineffective if authority to adjust work realignments through fair compensation did not exist. * * * Under the Railway Labor Act in a major dispute employees cannot be compelled to accept or arbitrate as to new working rules or conditions. * * * Thus under the Railway Labor Act provisions, it is possible for either party to completely block any change in working conditions by refusing to agree to a change and by refusing to arbitrate. Like the Harrington amendment, the Railway Labor Act, if it applied, would threaten to prevent many consolidations." *Id.* at 430-31.

The Eighth Circuit accordingly concluded that the Railway Labor Act was one of the laws from which carrier participants in ICC-approved transactions are exempt under § 11341(a) in implementing those transactions. *Id.* at 431-32.

The Eighth Circuit's reasoning, adopted below by the Commission as its own, has special—and we might add obvious—force in this case. The express rights of the trackage rights tenants to use their own crews was expressly recognized by the Commission to be a material term of each of the trackage rights applications it approved as being in the public interest. (Pet. App. 67a.) If the RLA were to apply to the crew selection process, the transaction approved by the Commission could be postponed while the "almost interminable" major dispute procedures of that Act were exhausted, or indeed frustrated altogether by threat of or resort to strike. The possibility of a strike in this case is not far-fetched: the MP's employees have already threatened and been enjoined from striking over this very matter. See note 8, *supra*.

The possibility that MP crews could resort to self help against the tenants has, if anything, even graver conse-

quences.[10] The very purpose of the grant of trackage rights was to protect and foster a competitive relationship between the tenants and the MP. It is inconceivable in the first instance that the tenants should have to bargain with and rely on MP employees in seeking to wrest new or protect existing traffic from the MP. And it would be astonishing if, as a result of a transaction approved by the Commission to maintain competition between the MP and the tenants, Congress intended to permit MP employees to interfere with and possibly shut down the tenants' entire operations. Moreover, if the MP employees demand, upon pain of strike, that MP ban tenant trains with tenant crews, and the tenant's employees demand, upon pain of strike, that the tenants not hire MP crews, a stalemate will result. Commerce will be interrupted and the Commission's approval of the trackage rights applications will be nullified. And finally, use of MP crews to operate the trains of the tenant lines obviously would require the approval of the MP, which would thus be empowered to frustrate the competition that the Commission intended to protect and preserve.

The short of the matter is that the Commission's reasoning was clear. It stated the unions' contentions and then rejected them because the tenants' ability to crew their own trains was material to the transaction and was thus exempt from RLA procedures under the rationale of *BLE* v. *CNW*. The decision may not be marked by organizational elegance, but "[t]he path which it followed can be discerned." *Colorado Interstate Gas Co.* v.

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[10] The RLA provides for bargaining only between one carrier "and the employees thereof," 45 U.S.C. § 152 First, not between one carrier and the employees of another. But if, as the decision below seems to suggest, the Act *could* be read to require the tenants to bargain with MP employees over the terms and conditions of employment of MP employees by the tenants, then presumably all of the Act's provisions would apply, including the MP's employees' right to resort to self help (such as picketing) against the tenants if their demands were not met.

FPC, 324 U.S. 581, 595 (1945). See also *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 532-33 (1946); *ICC* v. *Columbus & Greenville Railway*, 319 U.S. 551, 555 (1943).

B. The Decision Below Conflicts in Principle With the Decisions of Other Circuits.

The Eighth Circuit's decision in *BLE* v. *CNW* discussed above is not the only one to have held the RLA superseded by the Interstate Commerce Act with respect to disputes arising over implementation of ICC-approved transactions. Other decisions to the same effect include *Burlington Northern, Inc.* v. *American Railway Supervisors Ass'n*, 503 F.2d 58, 62-63 (7th Cir. 1974) (employee protection provisions ordered by ICC pursuant to merger are controlling in case of conflict with RLA procedures); *Bundy* v. *Penn Central Co.*, 455 F.2d 277, 279-80 (6th Cir. 1972) (minor dispute procedures of RLA are superseded by ICC-imposed order under § 5(2)(f) [now § 11347]); *IAM* v. *Northeast Airlines*, 400 F. Supp. 372, 373-74 (D. Mass. 1975), *aff'd*, 536 F.2d 975 (1st Cir. 1976) (RLA "is not applicable where the dispute arises out of a merger" because "Congress has provided a special mechanism for resolving the numerous problems atendant on such a merger"); *UTU* v. *Norfolk & Western Ry.*, 332 F. Supp. 1170, 1174 (N.D. Ohio 1971) ("plain language" of Interstate Commerce Act conferred "exclusive and plenary jurisdiction upon the ICC to approve mergers and relieve carriers from all other restraints of federal law, without carving a special exception with regard to the Railway Labor Act"). And the Sixth Circuit ruled in *Nemitz* v. *Norfolk & Western Ry.*, 436 F.2d 841, 845 (6th Cir.), *aff'd on other grounds*, 404 U.S. 37 (1971), in language echoing the Eighth Circuit's quoted above:

> "The authority vested in the I.C.C. to effectuate proposed mergers would be rendered ineffective if au-

> thority to adjust work realignments through fair compensation did not exist. Since, under the Railway Labor Act, employees cannot be compelled to accept or arbitrate new working rules or conditions, the application of the Railway Labor Act to situations such as that presented here, like the Harrington Amendment, would threaten to prevent many consolidations, and, therefore, should not be applied. *Brotherhood of Loc. Engineers* v. *Chicago & Northwestern Ry. Co., supra.*"

See also *Kent* v. *CAB*, 204 F.2d 263 (2d Cir. 1953), which held the procedures of the RLA inapplicable with respect to mergers approved by the CAB, under the protection provisions of the Civil Aeronautics Act, even though those provisions, which were generally similar to those in the Interstate Commerce Act, do not contain an express preemption provision of the kind found in 49 U.S.C. § 11341(a). See 49 U.S.C. App. § 1378 (1982 ed.).[11]

In the case at bar the court of appeals sought to distinguish *BLE* v. *CNW* on the ground that the Eighth Circuit in that case "recognized that immunity attached only to obstacles that would frustrate fruition of the" ICC-approved transaction. (Pet. App. 18a.) But as we have shown above, and as the Commission ruled below, the RLA major dispute procedures, if applicable to the crew selection process, *would* be an obstacle to fruition of

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[11] *Texas & New Orleans R.R.* v. *Brotherhood of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962), conflicts in certain respects with the authorities cited in the text. There the court ruled that the Norris-LaGuardia Act barred it from enjoining a threatened strike over the carrier's effort to implement an ICC-approved transaction. We believe that the court erred in holding that § 11347 [then § 5(2)(f)] of the Interstate Commerce Act is not part of the national pattern of labor legislation to which the Norris-LaGuardia Act must be accommodated. See *United States* v. *Lowden*, 308 U.S. 225, 236-38 (1939). In any event, even in that case the court acknowledged that union resorts to the RLA that were "contrary to the public interest" in the context of ICC-approved transactions would be unenforceable. 307 F.2d at 161-62.

the approved trackage rights transactions. Thus the court's distinction is one without a difference.

Moreover, the decision below misunderstands § 11341(a) and in that respect also is inconsistent with, if not squarely in conflict with, the Eighth Circuit. That section provides in pertinent part (emphasis added):

> "A carrier * * * participating in * * * a transaction approved by * * * the Commission under this subchapter may carry out the transaction * * * without the approval of a State authority. A carrier * * * participating in that approved * * * transaction *is exempt* from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction * * *."

As that plain language makes clear, the Commission is not called upon to do anything under § 11341(a). The types of transactions (including trackage rights transactions) that require Commission approval are set out in § 11343, and the criteria according to which the Commission is directed by Congress to grant or deny approval are set forth in § 11344. In particular, § 11344(c) provides that the Commission shall grant approval if "it finds the transaction is consistent with the public interest." Section 11341(a) then provides, without requiring further Commission interposition, that a carrier participant "is exempt from the antitrust laws and from all other law * * * as necessary to let that person carry out" the transaction that the Commission has approved. The Commission itself, in determining under § 11344 whether the public interest warrants approval of a proposed transaction, is not required to determine, or to make any findings, whether it would be "necessary" to override some particular law to effectuate the transaction if approved. *Schwabacher* v. *United States*, 334 U.S. 182 (1948).[12]

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[12] In *Schwabacher*, the Court explained that Commission approval of a proposed railroad merger "is dependent upon three, and upon

That is the point the Commission was making when, in answer to the contention of the unions that its initial orders approving the trackage rights applications did not expressly state that the carriers were exempt from the RLA, it said (Pet. App. 60a):

> "The terms of section 11341 immunizing an approved transaction from any other laws are self-executing and there is no need for us expressly to order or to declare that a carrier is specifically relieved from certain restraints."

And that is precisely what the Eighth Circuit ruled in rejecting a similar contention by the union in *BLE* v. *CNW* that the Commission had failed to make an express finding of exemption. The court held that the Commission's approval of a transaction, and its imposition of the required employee protections, "carried with it any exemption from the restraints of other laws as contemplated by § 5(11) [now § 11341(a)] to the extent necessary to carry out the merger." 314 F.2d at 432.

It is true that the Commission's approval of a transaction immunizes the carrier participants from the RLA only to the extent necessary to implement the transaction. Thus it may be that, subsequent to the Commission's order of approval, a union will argue that the carriers are seeking more immunity from the major dispute procedures of the RLA than is necessary to implement the approved transaction. In such a case the issue for decision will be whether application of the RLA

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only three considerations," those then set forth in the predecessor to § 11344. Following Commission approval, the "approved transaction goes into effect without need for invoking any approval under state authority, and the parties are relieved of 'restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved * * *.'" 334 U.S. at 194. *BLE* v. *CNW* and other such decisions by the lower courts in cases involving the RLA are consistent with that decision; the decision below is not.

would frustrate or impede implementation: if so, then the carriers are exempt from the RLA under § 11341(a). The issue will not turn on whether the Commission, in its order of approval, made any findings of the need for an exemption under § 11341(a) from some other statute for, as shown above, that section requires no action whatever by the Commission in passing on an application subject to § 11343. Rather, the function of the Commission under § 11344 is to determine whether a grant of the application is in the public interest and otherwise comports with the standards specified therein.[13]

The court of appeals' misunderstanding of § 11341(a) led it to the erroneous conclusion that the Commission "rejected the notion that it had to provide some basis for concluding that waiver of the Railway Labor Act was necessary" to the transaction it had approved. (Pet. App. 10a.) As we have shown, the Commission correctly construed § 11341(a) as not requiring findings with respect to exemption in the initial order of approval. When the issue of exemption subsequently arose, the Commission adequately explained why the crew selection process necessarily was exempt from the RLA. On both counts the Commission's decision is squarely in keeping with the statute and with *BLE* v. *CNW* (and the other decisions cited above), and on both counts the decision of the court of appeals is in conflict with the principle of those decisions.

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[13] This is not to say that an opponent of an application could not contend that the grant of the application would not be in the public interest under the circumstances of the particular case if the result would be to override rights under another statute such as the RLA, and the Commission might well have a duty to consider such a contention if made, but no such contention was made in the initial agency proceeding regarding the terms of the trackage right applications relative to crew selection.

C. Certiorari Is Warranted Now So That the Court May Resolve the Relationship Between the Two Statutes.

The role of the RLA in disputes arising out of carrier efforts to implement ICC-approved rail transactions presents the most pressing labor issue in the rail industry today. Litigation over this issue has erupted all over the country and as a consequence many transactions, already determined by the Commission to be in the public interest according to the criteria established by Congress in § 11344, have been or may be impeded. Thus, in *IAM* v. *Boston and Maine Corporation*, No. 84-3703-T (D. Mass. filed Nov. 15, 1984), the plaintiff union, urging the applicability of the RLA and relying on the decision of the court of appeals in the case at bar, has sought to enjoin the Boston and Maine, the Delaware and Hudson, and the Maine Central—three carriers whose common control by Guilford Transportation Industries was approved by the Commission under § 11343 [14]—from seeking to arbitrate a dispute over implementation pursuant to the mandatory arbitration provisions prescribed by the Commission. Other litigation also turning on the relation between the two statutes includes *Missouri Pac. R.R.* v. *UTU*, 580 F. Supp. 1490 (E.D. Mo. 1984), *pdg. on appeal*, No. 84-1465 (8th Cir.) (discussed at note 8, *supra*); *RLEA* v. *Butte, Anaconda and Pac. R.R.*, No. CV-85-73-BU (D. Mont.), *pdg. on appeal*, No. 85-3875 (9th Cir.) (preliminary injunction granted plaintiff claiming applicability of RLA to ICC-approved sale and lease); *RLEA* v. *Staten Island Railroad Corp.*, No. CV-85-1532 (E.D.N.Y., decided May 21, 1985), *pdg. on appeal*, No. 85-7483 (2d Cir.) (dismissal of suit to compel carrier to bargain under RLA over ICC-approved

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[14] See *Guilford Transp. Industries, Inc.—Control—Boston and Maine Corp.*, 366 I.C.C. 294 (1982), *aff'd in relevant part, Lamoille Valley R.R.* v. *ICC*, 711 F.2d 295 (D.C. Cir. 1983); *Guilford Transp. Industries, Inc.—Control—Delaware and Hudson Ry.*, 366 I.C.C. 396 (1982), *aff'd in relevant part, Central Vermont Ry.* v. *ICC*, 711 F.2d 331 (D.C. Cir. 1983).

sale transaction); *UTU* v. *Maine Central R.R.*, No. 85-0184-P (D. Me.) (suit to compel carrier to bargain under RLA over ICC-approved lease transaction); *Brotherhood of Locomotive Engineers* v. *Boston and Maine Corp.*, No. 85-2882-K (D. Mass.), *pdg. on appeal*, No. 85-1852 (1st Cir.) (dismissal of suit to compel carrier to bargain under RLA over ICC-approved lease transaction); *UTU* v. *Boston and Maine Corp.*, No. 85-3475-K (D. Mass.) (suit to compel carrier to bargain over ICC-approved lease transaction); *UTU* v. *Norfolk and Western Ry. Co.*, No. 85-3410 (D.D.C.) (suit to enjoin arbitrated implementing agreement and to compel the carrier to bargain under the RLA over ICC-authorized lease transaction, dismissed Nov. 27, 1985).

The pendency of all of these suits does not fully reflect the confusion and uncertainty in the rail industry over implementation of ICC-approved transactions, for on many rail properties unions have demanded bargaining under the RLA over union proposals that, if agreed to by the carrier, would block or impede implementation of approved transactions. Not all of those demands have yet spawned lawsuits, but the carriers generally view those demands as nonmandatory subjects of bargaining and litigation on that score is probable if not inevitable. In the meantime, whether in litigation or not, the carriers and the unions are at loggerheads. Neither side is served by this uncertainty—as evidenced by the unions' cross-petitions for certiorari in this case—and while it persists the implementation of approved transactions is being or may be postponed.

The fact that the court of appeals in the instant case has ordered a remand to the Commission should not be a deterrent to certiorari. On remand the Commission can only repeat, for the reasons stated by the Eighth Circuit in *BLE* v. *CNW*, that the RLA is preempted with respect to the crew selection provisions of the approved trackage rights transactions. That will not ameliorate

the harm caused by the ruling of the court below that the RLA can be preempted only to the extent found necessary by the Commission, for the unions will continue to brandish that decision (as they are now) in support of their contention that carriers must follow RLA procedures (and possibly face a strike) in seeking to implement transactions that the Commission has already approved in decisions that do not make any express findings under § 11341(a) concerning the RLA.

In sum, the decision below, the inconsistent results reached in the other litigation that is already pending, and the outstanding union bargaining demands mentioned above, are causing grave uncertainty and labor relations disputes throughout the rail industry. Management and labor are apparently in accord on one point, however, which is that the Court's guidance is needed now.

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted,

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No. 85-793

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
Petitioner,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND UNITED TRANSPORTATION UNION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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52 pp

QUESTIONS PRESENTED

Whether the Interstate Commerce Commission, when approving a transaction pursuant to 49 U.S.C. §§ 11343 and 11344 (1982), is required to make specific findings of necessity pursuant to 49 U.S.C. § 11341(a)(1982) in order to exempt carriers participating in the approved transaction from the requirements of the Railway Labor Act, 45 U.S.C. §§ 151-160 (1982)?

LIST OF PARTIES

Brotherhood of Locomotive Engineers and United Transportation Union were petitioners in the ase below in the District of Columbia Circuit Court of Appeals.

Interstate Commerce Commission and United States of America were respondents.

Missouri-Kansas-Texas Railroad Company, Denver & Rio Grande Western Railroad Company, Missouri Pacific Railroad Company, and Union Pacific Railroad Company were intervenors in support of the Interstate Commerce Commission.

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I.

OPINION BELOW

The decision of the United States Court of Appeals for the District of Columbia Circuit is reported at 761 F.2d 714 (D.C. Cir. 1985). It appears in the Appendix to Petitioner's Petition For Writ of Certiorari at A1.[1] The May 12, 1983 and October 19, 1983 orders of the Interstate Commerce Commission appear in the Petitioner's Appendix at A36 and A40.

II.

JURISDICTION

The judgment of the Court of Appeals was entered on May 3, 1985, and amended on July 12, 1985. On August 9, 1985, the Court of Appeals entered orders denying the petition for rehearing and the suggestions for rehearing *en banc*. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

III.

STATUTES INVOLVED

The statutes involved in this proceeding are the Interstate Commerce Act, 49 U.S.C. §§ 11341(a), 11343, 11344 and 11347 (1982), and the Railway Labor Act, 45 U.S.C. §§ 151-160 (1982). The pertinent provisions of these statutes are set forth in the Petitioner's Appendix at A55-A65.

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[1] On April 21, 1986, the Court granted the motion of petitioners to dispense with printing the joint appendix. References herein to the Appendix to the petitioner's petition for writ of certiorari will be designated by "App." References to the Joint Appendix to the briefs submitted to the Court of Appeals in the case below will be designated by "J.App."

IV.

STATEMENT OF THE CASE

This case presents the question of the circumstances under which the Interstate Commerce Commission ("ICC" or "Commission") may utilize its powers under 49 U.S.C. § 11341(a) (1982) to exempt carriers participating in transactions approved under 49 U.S.C. §§ 11343 and 11344 (1982) from the requirements of the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151-160 (1982).

A. Facts Giving Rise To The Controversy

On September 15, 1980, Union Pacific Corporation filed applications with the ICC pursuant to 49 U.S.C. §§ 11343 and 11344 (1982) seeking to acquire control over Missouri Pacific Corporation ("MP") and its carrier subsidiaries, and over Western Pacific Railroad Company ("WP"). The proposed consolidation of the Union Pacific ("UP"), Missouri Pacific, and Western Pacific railroads would result in one of the largest railroad systems in the country, covering over 22,000 miles of trackage, and creating single system rail service between the Pacific Northwest, northern and southern California, the Midwest, Mississippi River ports, Gulf Coast ports, and Texas-Mexico border points. *Union Pacific Corp., Pacific Rail System, Inc., and Union Pacific Railroad—Control—Missouri Pacific Corp. and Missouri Pacific Railroad*, 366 I.C.C. 459, 471-74 (1982), *aff'd in pertinent part sub nom. Southern Pacific Transportation Co. v. ICC*, 736 F.2d 708 (D.C. Cir. 1984) (per curiam), *cert. denied*, 105 S.Ct. 1172 (1985).

A number of carriers, including the petitioner, Missouri-Kansas-Texas Railroad Company ("MKT"), opposed the consolidation because of the serious anticompetitive effects of the acquisition. MKT operated over 2100 miles of track in Kansas, Missouri, Oklahoma and Texas, and its major lines extended from St. Louis and Kansas City to San Antonio, Houston and Galveston. At the time of the pro-

posed acquisition, MKT interchanged approximately one-fifth of its traffic with UP (at Kansas City) and MP (principally at Dallas-Ft. Worth). MKT estimated that it would suffer traffic diversions of approximately $23.5 million if the UP-MP-WP acquisition were approved, and contended that these diversions would jeopardize its ability to provide essential rail service to the shipping public. *Id.* at 479.

MKT was largely concerned about the potential loss of interchange traffic that originated at Omaha and other grain gathering points and that it received from UP at Kansas City. MP also interchanged traffic with UP at Kansas City. Despite the fact that MKT had less than one-half as many route miles in Texas as MP, MKT was UP's largest connecting carrier at Kansas City for Texas traffic and received over twice as much traffic from UP as MP did. If the UP-MP-WP acquisition were approved, MKT feared that UP would divert most of this Kansas City interchange traffic to MP. *Id.* at 530. In addition, MKT argued that the elimination of parallel competition between UP and MP, the second and third largest carriers in the Kansas City-Omaha corridor, would be inconsistent with the public interest. *Id.* at 698-99.

As part of its opposition case, and in an effort to minimize the anticompetitive effects of the UP-MP-WP consolidation, MKT filed applications seeking trackage rights over certain MP and UP lines, including the line between Kansas City and Omaha. MKT included in the trackage rights application a proposed trackage rights agreement that provided that "MKT, with its own employees, and at its sole cost and expense, shall operate its engines, cars and trains on and along Joint Track." MKT Trackage Rights Application, Exhibit 2, Section 5, I.C.C. F.D. No. 30,000 (Sub-No. 25) (filed Jan. 13, 1981). It furnished a labor impact statement predicated on the use of its own employees, and projected that "[b]ecause of the limited impact of its trackage rights arrangement and the increase in traffic volume which would accrue to MP as a result

of the proposed UP-MP control transaction, these trackage rights should have no adverse impact upon MP or UP employees." *Id.* at 4.

The ICC held hearings on MKT's trackage rights application. UP and MP vigorously opposed the trackage rights proposal. In addition, the Brotherhood of Locomotive Engineers ("BLE") and the United Transportation Union ("UTU") submitted evidence protesting MKT's trackage rights application. No party, however, challenged either MKT's right to use its own employees in its proposed trackage rights operations or the Commission's authority to approve MKT's proposed trackage rights agreement providing for operations by MKT crews.

On October 20, 1982, the ICC served its decision in the UP-MP-WP merger case. In that order, the Commission observed that its review of the proposed consolidation was governed by 49 U.S.C. § 11344, and noted that it was required to approve the transaction if it found the transaction to be "consistent with the public interest." 366 I.C.C. at 483. The Commission focused on the anticompetitive aspects of the proposed acquisition. It also considered, *inter alia*, the interest of carrier employees affected by the proposed transaction in making its "public interest" determination. *See* 49 U.S.C. § 11344(b)(1)(D) (1982). In addition, under 49 U.S.C. § 11347 (1982), the Commission was required to provide protective conditions for employees affected by the transaction, and it considered various arguments concerning those conditions. 366 I.C.C. at 618-19.

In its decision, the ICC held that unconditional approval of the UP-MP-WP consolidation would not be in the public interest because, *inter alia*, MKT would suffer an impairment of its ability to provide essential rail service on shipments moving from Omaha and other grain gathering points in the Midwest via Kansas City to Gulf Coast points. *Id.* at 530-31, 547. The Commission found:

> [t]he MP and MKT are each effective and efficient routes south of Kansas City.
>
> After the consolidation UP will have an incentive to favor the MP line in order to maximize its profit from movements south of Kansas City. Because MKT handles the largest amount of UP traffic moving to Texas via Kansas City it will be the competitor south of Kansas City most directly affected by the shift of UP traffic to the MP. . . .
>
> * * * *
>
> In combination with the elimination of UP-MP parallel competition between Kansas City and Omaha/Council Bluffs this vertical foreclosure of MKT at Kansas City represents a substantial lessening of competition for traffic, especially grain, moving from the area between Omaha/Council Bluffs and Kansas City to the Gulf.

Id. at 530-31. The ICC concluded that those anticompetitive consequences could be "ameliorated," *id.* at 531, and in some respects "fully off-set," *id.* at 547, by conditioning its approval of the transaction on the grant of certain of MKT's trackage rights requests, *id.* at 548.

In defining the nature of these conditions, the Commission specifically addressed the crew manning issue in analyzing MKT's trackage rights application. The ICC commented on MP's challenge to MKT's estimate of the number of MKT employees required to provide the proposed service. 366 I.C.C. at 566-72. It agreed that MKT most likely had underestimated its crew requirements, but still found that MKT's proposed operation would be entirely feasible with an increased MKT crew complement. *Id.* at 569.

The Commission also carefully examined the interests of the carrier employees affected by MKT's trackage rights

proposal. It found that the transactions were consistent with the public interest and imposed the labor protective conditions that it had specified in *Norfolk & Western Railway—Trackage Rights—Burlington Northern*, as modified by *Mendocino Coast Railway—Lease and Operate—California Western Railroad*, for the benefit of those employees.[2] 366 I.C.C. at 621. These conditions provide generous compensatory benefits ensuring, *inter alia*, that any employee dismissed or displaced as a result of the transaction will continue to receive the equivalent of up to six years of prior wages. In addition, the conditions provide for compulsory arbitration of disputes arising under the conditions, including disputes concerning the implementation of the authorized transaction.[3]

UTU (and a number of other labor unions) appealed the Commission's decision approving the UP-MP-WP consoli-

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[2] *See Mendocino Coast Ry.—Lease and Operate—California W. R.R.*, 360 I.C.C. 653, 644 (1980), *aff'd sub nom. Railway Labor Executives' Ass'n v. United States*, 675 F.2d 1248 (D.C. Cir. 1982); *Norfolk & W. Ry.—Trackage Rights—Burlington N.*, 354 I.C.C. 605 (1978), *modified sub nom. Mendocino Coast Ry.—Lease and Operate—California W. R.R.*, 360 I.C.C. 653 (1980), *aff'd sub nom. Railway Labor Executives' Ass'n v. United States*, 675 F.2d 1248 (D.C. Cir. 1982).

[3] The ICC imposed the *New York Dock* conditions for the benefit of employees affected by the primary transaction, 366 I.C.C. at 618-21. *See New York Dock Ry.—Control—Brooklyn Eastern Dist. Terminal*, 360 I.C.C. 60, *aff'd sub nom. New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979). The major differences between the *New York Dock* conditions and the *Mendocino* conditions are twofold. First, under article I, section 4 of the *New York Dock* conditions, carriers must give employees *90* days written notice of changes in operations, services, or equipment as a result of a transaction that may cause dismissal or displacement of employees or rearrangement of forces; under article I, section 4 of the *Mendocino* conditions, only *20* days notice is required. Second, under the *New York Dock* conditions, the carrier may not institute operational changes until an implementing agreement has been reached with the unions, either through negotiations or arbitration; under article I, section 4 of the *Mendocino* conditions, carriers may proceed with the proposed operational changes *even if* an implementing agreement has not been reached.

dation, arguing that the level of employee protection imposed on the primary transaction was insufficient to satisfy the provisions of 49 U.S.C. §§ 11344(b)(1)(D) and 11347. BLE did not appeal the ICC's October 20, 1982 decision. Neither UTU nor any other union claimed on appeal that approval of MKT's trackage rights application allowing MKT to use its own crews violated the Railway Labor Act (or any other statute). The United States Court of Appeals for the District of Columbia Circuit rejected the unions' arguments assailing the level of employee protection imposed by the ICC and affirmed this aspect of the Commission's decision. *Southern Pacific Transportation Co. v. ICC*, 736 F.2d 708, 725 (D.C. Cir. 1984) (per curiam), *cert. denied*, 105 S.Ct. 1172 (1985).

Both prior to and subsequent to the Commission's October 20, 1982 order, MKT held discussions with BLE and UTU representatives as the organizations representing MKT's operating employees, concerning the necessity to commence the trackage rights operations as soon as possible after approval was granted. In November, 1982, MKT exchanged proposals with these BLE and UTU representatives concerning the manning of the trackage rights operations. J.App. at 130, 134-36. MKT negotiated amendments to its collective bargaining agreements with BLE on January 5, 1983 to govern the trackage rights operation. J.App. at 142. On January 6, 1983, MKT commenced operations as a trackage rights tenant over the involved MP and UP lines using its own crews. J.App. at 27. On March 10, 1983, MKT and MP filed a formal trackage rights agreement with the ICC that provided that MKT would use its own crews and equipment in the trackage rights operation, as authorized by the Commission. J.App. at x, No. 15. MKT reached formal agreements with UTU concerning the implementation of the trackage rights operation on April 11 and April 13, 1983. J.App. at 130. Those agreements fulfilled MKT's obligations under article I, section 4 of the *Mendocino* conditions to negotiate with

the collective bargaining representatives of its employees affected by the rearrangement of MKT forces required to operate the trackage rights.[4]

After MKT commenced its trackage rights operations, UTU, on behalf of *MP* employees,[5] demanded of MP that

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[4] Article I, section 4 of the *Mendocino* conditions provides in pertinent part:

> When the railroads contemplate a transaction, they shall give at least twenty (20) days' written notice of such intended transaction by posting a notice on bulletin boards convenient to the interested employees of the railroads and by sending registered mail notice to the representatives of such interested employees. Such notice shall contain a full and adequate statement of the proposed changes to be effected by such transaction, including an estimate of the number of employees of each class affected by the intended changes.
>
> At the request of either railroad or representatives of such interested employees, negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of this appendix shall commence immediately and continue for not more than twenty (20) days from the date of notice. Each transaction which will result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4.

If at the end of the twenty-day period there is a failure to agree, the negotiations shall terminate and either party to the dispute may submit it to arbitration. *Norfolk & W. Ry.—Trackage Rights—Burlington N.*, 354 I.C.C. 605, 610-11 app. (1978), *modified sub nom. Mendocino Coast Ry.—Lease and Operate—California W. R.R.*, 360 I.C.C. 653 (1980), *aff'd sub nom. Railway Labor Executives' Ass'n v. United States*, 675 F.2d 1248 (D.C. Cir. 1982).

[5] The UTU is the statutory bargaining representative of both MKT and MP employees. Having made an agreement with MKT governing the proposed operation in its capacity as representative of MKT's employees, its subsequent effort to attack collaterally that agreement in the course of representing MP employees raises, at the least, trouble-

MKT use MP crews to conduct MKT's trackage rights operations. J.App. at 122-23. MP did not accede to this demand because the ICC specifically had authorized MKT to use its own crews. As stated in UTU's brief to the Court below, "petitioner UTU responded to MoPac's refusal to negotiate by declaring a strike of MoPac for April 4, 1983." Brief for Petitioner at 13. On March 30, 1983, MP filed a complaint in the United States District Court for the Eastern District of Missouri seeking declaratory and injunctive relief against the strike. On that same date, the District Court entered a temporary restraining order prohibiting, *inter alia*, implementation of UTU's strike threat. The District Court preliminarily enjoined the strike on February 7, 1984, and issued a permanent injunction soon thereafter. *Missouri Pacific Railroad v. UTU*, 580 F. Supp. 1490, 1507 (E.D. Mo. 1984), *aff'd*, 782 F.2d 107, 110 (8th Cir. 1986), *petition for cert. filed*, 54 U.S.L.W. 3463 (U.S. Dec. 18, 1985) (No. 85-1054).

On April 4, 1983, shortly after the District Court issued a temporary restraining order prohibiting UTU's threatened strike, BLE filed with the ICC a "Petition For Clarification" of the Commission's October 20, 1982 order, as to which the time for seeking judicial review had expired months earlier. BLE cited "[r]ecent communications" from MP to the effect that MKT and DRGW were relying on the Commission's order in Sub-No. 25 (and Sub-No. 18) as authority for the use of their own crews in performing the trackage rights operations in question. BLE argued that the Commission's October, 1982 order did not address the crew issue. J.App. at 2.

The Commission denied BLE's petition in an order served on May 18, 1983. App. at A36-A39. In that decision, the Commission concluded:

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some questions concerning its duty to "make and maintain" agreements under section 2, First of the Railway Labor Act. 45 U.S.C. § 152, First (1982). That issue is, however, extraneous to the question presented here.

> The consolidation decision does not require clarification. We approved the responsive trackage rights applications of DRGW and MKT in Sub-No. 18 and Sub-No. 25 subject only to applicable employee protective conditions and the requirement that the parties negotiate compensation for use of the MP lines (or request us to set compensation in the event of an impasse). Inasmuch as DRGW and MKT proposed in their applications that the operations would be performed with their own crews, our approval of the applications authorizes such operations . . . .
>
> BLE has presented no arguments or evidence setting forth any issue in need of clarification. Rather, BLE is attempting to reargue an issue that has already been decided.

App. at A38.

Thereafter, on May 31, 1983, BLE filed with the ICC a "Petition For Reconsideration" of the May 18 order. BLE contended that the Commission exceeded its jurisdiction in its October 20, 1982 order when it authorized MKT to use its own crews. BLE's conclusion and prayer for relief provided:

> In sum, the Brotherhood of Locomotive Engineers submits that the Commission does not have jurisdiction over these labor disputes since such matters are within the purview of the Railway Labor Act, and respectfully requests that the Commission grant this petition for reconsideration and issue an order holding that crew assignments and manning of positions are matters not within the jurisdiction of the Commission but are labor disputes to be resolved under the procedures of the Railway Labor Act.

J.App. at 54.

On June 7, 1983, UTU also petitioned the ICC for reconsideration of its May 18, 1983 order. UTU allegedly had presumed that the *Mendocino* conditions[6] would provide *MP* employees with an opportunity to participate in *MKT's* decision to assign crews for the trackage rights operation. *See* UTU Reply to MKT Motion to Dismiss at 14. UTU argued:

> This Commission does not have the authority under 49 U.S.C. § 11341 to grant an exemption from the unilateral change prescriptions of the Railway Labor Act, and even if it did, it has not done so in this case.

J.App. at 77.

The Commission entered an order on October 25, 1983, denying BLE's and UTU's petitions for reconsideration. App. at A40-A50. In that decision, the Commission focused on BLE's and UTU's principal argument that the proposed trackage rights operations allowing tenants to use their own crews unilaterally changed the working conditions of MP employees, and that the Commission had no jurisdiction to determine such labor disputes. App. at A42-A43. It then explained in great detail why the unions' arguments were incorrect.

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[6] This argument was a specious *post hoc* rationalization for UTU's failure to object in a timely manner to the crewing provisions of MKT's trackage rights proposal. As demonstrated above, MKT had complied fully with article I, section 4 of *Mendocino* when it negotiated agreements with UTU (and BLE) governing the rearrangement of MKT employees caused by the approval of the trackage rights application. *See supra* p. 8. To the extent that MP employees can establish that they have been adversely affected with respect to compensation, they may have the right to compensatory payments from MP under other sections of the *Mendocino* conditions. They have no right under article I, section 4 to arbitrate the identity of the crews to perform the trackage rights operations because the Commission already decided that issue.

The Commission properly found that the trackage rights agreements did not result in any change in MP employees' working conditions, and rejected the argument that the trackage rights constituted a transfer or contracting out of work previously performed by MP employees.[7] App. at A48. It reiterated that it had approved the MKT and DRGW trackage rights applications "to ameliorate certain anticompetitive impacts of the UP-MP consolidation," and it emphasized that the trackage rights operations would be conducted in competition with UP-MP operations, because "MKT and Rio Grande will be handling traffic for their own accounts not for UP-MP." App. at A48-A49. Under these circumstances, the Commission found that "UP-MP has not transferred or contracted out any work by agreeing to the trackage rights as a condition to the consolidation." App. at A48-A49.

The Commission reaffirmed that "crew assignment provisions in trackage rights agreements are within this Commission's subject matter jurisdiction to the extent they relate to the transportation effects of the proposed transaction," App. at A49, and held that trackage rights agreements found to be consistent with the public interest under 49 U.S.C. § 11344 could be implemented without any further approval in light of the Commission's exemption authority under 49 U.S.C. § 11341(a) (1982). App. at A50. According to the Commission, this exemption authority applies to the Railway Labor Act *status quo* provision barring unilateral changes by carriers in working conditions

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[7] As MP correctly stated, it is standard industry practice for trackage rights tenants to use their own crews. Indeed, MP and MKT prior to entering into this trackage rights agreement had several outstanding trackage rights agreements in force, and under each arrangement the tenant was authorized to conduct operations with its own crews. J.App. at 89. Significantly, the unions introduced no evidence of any term of a collective bargaining agreement that provided employees of the owning railroad with the right to participate in crew selection by a trackage rights tenant.

and is self-executing (*i.e.*, if adequate findings are made under 49 U.S.C. § 11344 to establish that a transaction is consistent with the public interest, no further findings under section 11341(a) are required).[8] Any carrier employees adversely affected by the transaction would be entitled to benefits under the *Mendocino* conditions. App. at A50.

In December, 1983, BLE and UTU filed with the United States Court of Appeals for the District of Columbia Circuit petitions for review of the ICC's May 18, 1983 and October 25, 1983 orders. The unions claimed in the case below that, *inter alia*, the ICC had exceeded its authority by exempting MKT's decision to use its own crews in the trackage rights operation from the requirements of the Railway Labor Act.[9]

In a split decision, a panel of the District of Columbia Circuit Court of Appeals vacated the ICC's May 18, 1983 and October 25, 1983 decisions. The panel majority (Judges Wright and Mikva) found that the ICC did not show a necessity for waiving the Railway Labor Act in the ex-

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[8] The Commission adopted the following reasoning of the Eighth Circuit in *Brotherhood of Locomotive Eng'rs v. Chicago & N.W. Ry.*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963):

> Congress intended the ICC to have jurisdiction to prescribe the method for determining the solution of labor problems arising directly out of approved mergers .... [T]o hold otherwise would be to disregard the plain language of § 5(11) conferring exclusive and plenary jurisdiction upon the ICC to approve mergers and relieving the carrier from all other restraints of federal law.

Id. at 431-32.

[9] The unions also argued that the Commission's action violated article I, section 2 of the *Mendocino* conditions imposed pursuant to 49 U.S.C. § 11347. That argument was unresolved. The dissent rejected it, and the panel majority found it unnecessary to reach it in light of the finding that the Commission failed to justify an exemption from the requirements of the Railway Labor Act. App. at A13.

ercise of its Interstate Commerce Act authority.[10] App. at A13. The majority held that "the Commission must supply some basis for a necessity determination before the exemption authority applies," and relied on a line of Supreme Court cases that supposedly hold that the "ICC may waive . . . laws only if these . . . laws pose an obstacle to the transaction." App. at A14.[11] The majority rejected the ICC's holding in the October 25, 1983 order that "the terms of Section 11341 immunizing an approved transaction from any other laws are self-executing," and stated that "to the extent that [*BLE v. CNW*][12] may be read to say that ICC need supply no *basis* for the necessity determination, we find the interpretation ill-conceived and reject it." App. at A16 n.6. The majority then remanded the case to the Commission with instructions that "the Commission must explain why termination of the asserted right to participate in crew selection is necessary to effectuate the pro-competitive purpose of the grant of trackage rights or some other purpose sufficiently related to the transaction." App. at A18.[13]

Judge MacKinnon filed a vigorous dissent to the majority opinion. He correctly noted that "the whole basis

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[10] The majority also rejected the arguments of respondents and intervenors that BLE and UTU's appeals were untimely because they were aggrieved by the October 20, 1982 decision of the ICC and failed to file their petitions for review within the statutorily prescribed 60-day period, as required by 28 U.S.C. § 2344 (1982). App. at A9-A12.

[11] *See Callaway v. Benton*, 336 U.S. 132 (1949); *Schwabacher v. United States*, 334 U.S. 182 (1948); *Seaboard Air Line R.R. v. Daniel*, 333 U.S. 118 (1948); and *Texas v. United States*, 292 U.S. 522 (1934).

[12] *Brotherhood of Locomotive Eng'rs. v. Chicago & N.W. Ry.*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963).

[13] In its original decision of May 3, 1985, the majority simply vacated the Commission's order, leaving the parties to their rights under the Railway Labor Act. During the pendency of the petitions for rehearing and suggestions for rehearing *en banc*, the panel majority amended the decision *sua sponte* to remand to the Commission.

for granting the trackage rights, which included the crew selection provisions, was the implicit conclusion that the granting of such rights was *necessary* to the approval of the merger." App. at A24. He observed that 49 U.S.C. § 11341(a) grants the ICC very broad exemption powers and cited *BLE v. CNW* to support his and the Commission's view that the terms of that paragraph are "self-executing." App. at A25-A26. Judge MacKinnon discussed all of the Supreme Court cases relied on by the majority to support its "obstacle" standard of exemption. His conclusion was:

> [N]ot only did the Supreme Court *not* adopt the rigorous 'obstacle' standard which the majority today requires, the Court envisioned that the legislative purpose was to grant the Commission *greater* authority than the majority suggests to override state laws where needed to approve transactions 'consistent with *the public interest*' and to ensure that they are 'just and reasonable.' *Schwabacher*, 334 U.S. at 194-195.

App. at A31.

Judge MacKinnon agreed with the majority that "the ICC cannot bootstrap any exemption to its approval of transactions without justification," but he correctly pointed out that "this is far from such a case, since the necessity for waiver is clear." App. at A32. He then stated:

> [T]he whole point of granting the trackage rights applications was to reduce the anti-competitive effects of the consolidation (J.A. 169). Under the ICC's decision the Katy and the Rio Grande will be handling traffic for their own accounts, not for the consolidated UP-Missouri Pacific-Western Pacific (*Id.*). Thus, the trackage rights operations were meant to be conducted *in competition with* the merged UP-Missouri Pacific-Western Pacific operations, *Id.*, and to offset to some extent the

> monopolistic effects of that enormous consolidation. The majority opinion gives short shrift to these essential reasons for the ICC's decision. To be sure, the Commission's goal of preservation of competition through the grant of trackage rights might well be frustrated by the prospect of requiring railroads granted those rights to negotiate with the union representing the employees of its *competitors*. It is no surprise the Commission did not feel compelled to spell out specifically such a proposition.

App. at A32 (footnote omitted).

Both the ICC and MKT filed petitions for rehearing and suggestions for rehearing *en banc*. Following the majority's *sua sponte* amendment of its decision, those petitions were denied by the Court of Appeals in orders dated August 9, 1985.[14] On March 24, 1986, this Court granted the petitions of the ICC and MKT for writs of certiorari to the District of Columbia Circuit Court of Appeals.

V.

SUMMARY OF ARGUMENT

The ICC's decisions below are fully supportable and should be affirmed. The Court of Appeals decision setting aside the ICC's action is bottomed on a narrow and crabbed reading of the scope of the Commission's authority under 49 U.S.C. § 11341(a) (1982), a reading that is at odds with the plain meaning of the statute, the national purpose evidenced by nearly 70 years of legislative history and prior decisions of this Court.

As we demonstrate *infra*, 49 U.S.C. § 11341(a) ordains the scope of the ICC's authority as "exclusive" and elim-

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[14] Senior Circuit Judge MacKinnon voted to grant the petition for rehearing, and Circuit Judge Starr voted to grant the suggestion for rehearing *en banc*. App. at A53-A54.

inates all avil by further providing that once a transaction is approved, its participants are "exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to . . . carry out the transaction . . . ." Nothing may be found in the statute to suggest a special exception for the Railway Labor Act.

As we further demonstrate, the plenary and unqualified language of section 11341(a) is no accident. Continuously since the end of the First World War, the railroad industry has been in a greater or lesser state of economic disarray, characterized by parlous financial condition, increased competition from other transportation modes and declining traffic and employment. The legislative response has been to adopt a national policy favoring and fostering railroad consolidation, by encouragement or sometimes compulsion, and to achieve this national objective in part by overriding all other laws that might inhibit its attainment. In adopting the successive legislation implementing this goal—the Transportation Act of 1920 ("1920 Act"), the Emergency Railroad Transportation Act of 1933 ("ERTA"), and the Transportation Act of 1940 ("1940 Act")—the effects of accomplishing consolidations on the railroad work force have not been ignored. Yet Congress has always come down on the side of a conclusion that consolidations were in the long term interest of rail labor, that a complete exemption of approved transactions from all other laws was required, and that employee protection should be accomplished by developing a system of compensation for the adverse effects of consolidations, rather than providing labor with a vehicle for thwarting or even substantively modifying the transactions. All attempts to carve a permanent exception for the RLA from section 11341(a) (and its predecessors) have been unsuccessful, as have attempts to impose substantive limitations on approved transactions.

As we further demonstrate, there can be no doubt that the procedures of the RLA conflict with the implementation of this (or any) approved transaction. The essence

of the RLA is the preservation of the status quo for as long a period as possible, and the coincident prohibition of self-help or unilateral change until the procedures of the RLA have been exhausted. At that time, unions are free to strike over unmet demands. The essence of the implementation of a consolidation or other approved transaction is the prompt effecting of change to achieve the public interest objectives, in the absence of which the transaction could not have been approved. Under the Commission's standard employee protective conditions, compulsory arbitration is available to resolve disputes concerning implementation of approved transactions. Thus, the intentionally protracted RLA procedures, delaying change, and the preservation of employees' right to strike are intrinsically at odds with the policy favoring approved transactions.

The particular claim giving rise to the instant dispute is an especially acute reflection of this dichotomy. The UP-MP-WP consolidation could *not* have been approved as being consistent with the public interest unless, *inter alia*, MKT were given the trackage rights at issue to compete independently with the consolidated carrier. Yet the rail brotherhoods' essential claim is that MKT should be precluded from mounting an independent operation with its own employees and instead should be captive to RLA procedures that would allow the employees of MP—the carrier with which it is supposed to be aggressively competing—to strike and to shut down the trackage rights operation required by the public interest if MP fails to accede to their employees' demands to crew MKT trains performing the trackage rights operation.

We next demonstrate the error of the Court of Appeals conclusion that the ICC was required to make specific findings establishing that an exemption from the RLA was necessary. This Court has long since established that the findings the ICC must make are the public interest findings required to approve the transaction in the first in-

stance. Once those findings are made, the ICC's exemption authority is self-executing. Finally, we demonstrate that, whether required or not, the ICC did, in fact, make findings justifying the necessity of the exemption. The Court of Appeals majority, although it couched its decision in terms of an alleged absence of findings, in reality simply disagreed with the ICC's findings. As the dissent correctly observed: "In doing so, the panel has usurped the statutory authority of the ICC and has substituted its judgment for that of the ICC." App. at A34.

VI.

ARGUMENT

A. The ICC Has Plenary Authority To Exempt Carriers Participating In Transactions Approved Under 49 U.S.C. §§ 11343 And 11344 From Any And All Provisions Of The Railway Labor Act, As Necessary To Permit Implementation Of The Transactions

Section 11341(a) of the Interstate Commerce Act ("ICA") could scarcely be clearer. *See* 49 U.S.C. § 11341(a) (1982). It establishes that the Commission's authority to approve, condition, or disapprove the transactions specified in the balance of the subchapter—which include consolidations and mergers—is "exclusive." *Id.* It further "avoids any ambiguity" by providing, with but a single qualification or exception, that parties to approved transactions are "exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction." *Minneapolis & St. Louis Railway v. United States*, 361 U.S. 173, 190-91 n.12 (1959). The sole exception relates to State law requirements for majority (or other) shareholder voting on certain corporate transactions. 49 U.S.C. § 11341(a) (1982). There is no exception for *any* provision of Federal law, including the RLA. Although the Court of Appeals, in amending its original decision to provide for a remand to the Commis-

sion, has belatedly recognized that the exemption provision does apply to the Railway Labor Act, the practical effect of its action is to diminish section 11341(a) in a fashion that is inconsistent with the plain meaning of that provision, with its legislative history, and with prior decisions of this Court.

1. The legislative history of section 11341(a) comports with and reinforces the plain meaning of that provision as sweeping aside the provisions of the Railway Labor Act to the extent they would impede an approved transaction.

The plenary language of section 11341(a) is no accident. It has a history going back more than 60 years. A tracking of that history and the attempts to modify the Commission's exemption authority demonstrates that the Congress meant what it said. During this entire period, the legislative will has been to foster railroad consolidation, either by compulsion or by encouragement, and in either case, to override all other laws that might inhibit that national objective.

a. Transportation Act of 1920

Section 11341(a) had its origin in the Transportation Act of 1920. *See* Transportation Act of 1920, Pub.L.No. 66-152, ch. 91, § 407(8), 41 Stat. 456, 482 (1920) (codified as amended at 49 U.S.C. 11341(a) (1982)). The 1920 Act returned the railroads to private ownership after a period of government control necessitated by the emergency state created by World War I, and established for the first time a national transportation policy favoring railroad consolidations.[15]

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[15] The Senate Committee Report on S.3288, the Senate version of the bill, provided that "heretofore, the regulation of transportation has been regarded merely as a restriction imposed upon particular carriers. For the first time it is proposed to look upon transportation as a subject of national concern and from a national standpoint." S. Rep. No. 304, 66th Cong., 1st Sess. 18 (1919). As the Court stated in *Texas v. United*

The 1920 Act amended section 5 of the Interstate Commerce Act by adding section 407, paragraphs (2) and (4) (hereinafter referred to as "sections 5(2) and 5(4) of the 1920 Act"), which provided that the Commission could authorize consolidations "subject to such terms and conditions as it shall find to be just and reasonable," if the proposed transaction was in harmony with and in furtherance of a national plan for consolidation of railway properties established by the ICC, and would promote the public interest. *See* Transportation Act of 1920, Pub.L.No. 66-152, ch. 91, § 407(2), (4), 41 Stat. 456, 481 (1920). The 1920 Act provided in section 407, paragraph (8) (hereinafter referred to as "section 5(8) of the 1920 Act") that carriers affected by orders of the ICC approving consolidations and leases:

> shall be and they are hereby, relieved from the operation of the 'antitrust laws,' as designated in section 1 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, and of all other restraints or prohibitions by law, State or Federal, in so far as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section.

Id. § 407(8), 41 Stat. at 482.

The legislative history surrounding section 5(8) focused on the exemption of consolidations from the antitrust laws. During the House debate on its version of the bill (H.R.

States, 292 U.S. 522 (1934), "the Transportation Act of 1920 introduced into the federal legislation a new railroad policy, seeking to insure an adequate transportation service. . . . The authority given to the Commission to authorize consolidations, purchases, leases, operating contracts and acquisition of control was given in aid of that policy." *Id.* at 530.

10453), Congressman Sims moved to strike the entire exemption section because, in his view, it repealed part of the Sherman antitrust law. 58 Cong. Rec. 8593 (1919). Congressman Hudspeth offered a substitute amendment designed to preserve the States' authority to regulate carriers, "provided that nothing in this Act shall relieve or exempt any carrier or express company from obedience to the constitution and antitrust laws of the state of its creation, or in which it may operate." 58 Cong. Rec. 8595 (1919). The Hudspeth amendment and Congressman Sims' motion to strike the entire exemption section were rejected. 58 Cong. Rec. 8602 (1919). The breadth of the exemption was addressed in the Conference Report. It provided that "an order of the Commission approving a specified consolidation may be carried out notwithstanding any State or Federal restraining or prohibitory law to the contrary." H.R. Rep. No. 650, 66th Cong., 2d Sess. 64 (1920).[16]

b. Emergency Railroad Transportation Act of 1933

By 1933, as a result of the Depression, many railroads were suffering financially and were struggling to remain in business. Many were bankrupt, while others had borrowed large sums of money from the Reconstruction Finance Corporation to fund continuing operations. S. Rep. No. 87, 73rd Cong., 1st Sess. 1 (1933). To meet these interest charges, many railroads deferred maintenance. H.R. Rep. No. 193, 73rd Cong., 1st Sess. 9 (1933). Railroad employment dropped from 1,750,000 to 1,000,000. *Id.* In an effort to resolve the crisis, Congress enacted the Emer-

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[16] The 1920 Act also created a Labor Board to decide railroad labor disputes involving grievances, work rules, and working conditions. *See* Transportation Act of 1920, Pub.L. No. 66-152, ch. 91, tit. III, 41 Stat. 456, 469 (1920). It provided further that all carriers and their employees had the duty "to exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier" because of labor disputes. *Id.* § 301. 41 Stat. 469. *United States v. Lowden*, 308 U.S. 225, 236 (1939).

gency Railroad Transportation Act of 1933, Pub.L.No. 68, ch. 91, 48 Stat. 211 (1933) (title I expired June 17. 1936; title II amended 1940).

Title I of ERTA was temporary legislation—of ultimately three years duration[17]—that was intended to help the railroads become financially stable. Intense competition among the railroads had resulted in unnecessary expenses. *The Emergency Transportation Act of 1933: Hearings on S.1580 Before the Senate Comm. On Interstate Commerce*, 73rd Cong., 1st Sess. 11 (1933). Accordingly, Congress established a federal railroad coordinator to encourage carriers to eliminate unnecessary expenses and duplication of services, and to take other measures designed to prevent "undue impairment of net earnings." The Emergency Railroad Transportation Act of 1933, Pub.L.No. 68, Title I, § 4, 48 Stat. 211, 212 (1933); S. Rep. No. 87, 73rd Cong., 1st Sess. 1 (1933). The coordinator did not have authority to compel consolidations. *See* 77 Cong. Rec. 4858 (1933). *See also St. Joe Paper Co. v. Atlantic Coast Line Railroad*, 347 U.S. 298, 317 (1954).

In hearings on the bill, labor representatives expressed concern that the coordinator's efforts to cut costs might result in fewer jobs and unfavorable working conditions for employees. *The Emergency Railroad Transportation Act of 1933: Hearings on H.R. 5500 Before the House Comm. on Interstate and Foreign Commerce*, 73rd Cong., 1st Sess. 25, 50 (1933). In response to those concerns, the Senate Interstate Commerce Committee agreed that "the economies to be secured [under Title I] should not result in additional dismissals of large numbers of railroad employees." S. Rep. No. 87, 73rd Cong. 1st Sess. 1 (1933). The Committee therefore included in section 7 of Title I a provision that employees could not be dismissed as a result

[17] Originally enacted for one year, Title I was extended for an additional year by Presidential proclamation, Proclamation No. 2082 (May 2, 1934), and then for a third year, until June 17, 1936, by Congress, S.J. Res. 112, 74th Cong., 1st Sess., 79 Cong. Rec. 9346 (1935).

of the coordinator's orders. The Emergency Transportation Act of 1933, Pub.L.No. 68, tit. I, § 7(b), 48 Stat. 211, 214 (1933).

Labor representatives also were concerned that the economic measures taken by carriers in response to the coordinator's orders might result in reduced wages. As a result of this concern, in enacting section 10(a) of ERTA (an exemption provision similar to section 5(8) of the 1920 Act), Congress provided that "nothing herein shall be construed to repeal, amend, suspend, or modify any of the requirements of the Railway Labor Act or the duties and obligations imposed thereunder or through contracts entered into in accordance with the provisions of said Act." *Id.* § 10(a), 48 Stat. at 215.

Thus, in the extraordinary and temporary provisions of ERTA's Title I, Congress expressly narrowed the plenary exemption authority of section 5(8) of the 1920 Act by carving out an exception for the Railway Labor Act, an evident recognition of the fact that no such exception was implicit in section 5(8). At the same time, however, Congress enacted Title II, section 202 of ERTA as permanent legislation, amending the consolidation provisions of the 1920 Act so as, *inter alia*, to give the ICC jurisdiction over holding companies. The Emergency Railroad Transportation Act of 1933, Pub.L.No. 68, tit. II, § 202, 48 Stat. 211, 217 (1933). In doing so, Congress reenacted in section 202, paragraph (15) (hereinafter referred to as "section 5(15) of ERTA"), without substantive change, and without a Railway Labor Act exception the broad exemption provision that formerly had been designated as section 5(8) of the 1920 Act. *Id.* at § 202(15), 48 Stat. at 219. Thus, the predecessor of section 11341(a) continued intact and unlimited.

c. Transportation Act of 1940

The railroads continued to experience financial difficulties after the enactment of ERTA. By 1937, the number

of bankrupt railroads was at its highest point, and consolidation activity pursuant to the government's national plan was at a new low. *See* Leonard, *Railroad Consolidation Under the Transportation Act of 1920* 235 (1946). *See also* 1938 *I.C.C. Ann. Rep.* 2-3.

Consequently, in 1938 President Roosevelt appointed three ICC Commissioners to prepare a comprehensive analysis of the rail industry's problems. This "Committee of Three" recommended establishing a Transportation Authority (similar to the federal coordinator under the ERTA) to plan and to encourage railroad consolidations, coordinations, and unifications to eliminate waste, and recommended giving the Commission authority to require unifications if sought by at least one carrier. *Immediate Relief for Railroads, Message From the President of the United States Transmitting His Recommendations for Means of Immediate Relief for Railroads*, H.R. Doc. No. 583, 75th Cong., 3d Sess. 20 (1938). *See also St. Joe Paper Co.*, 347 U.S. at 318. A bill was introduced in the House (H.R. 2531) to implement the recommendations of the Committee of Three. Section 209 of Title II of the bill had language that was identical to paragraph 10(a) of Title I of ERTA, authorizing exemptions from the antitrust and all other laws, except laws for the protection of the public health or safety and the Railway Labor Act. H.R. 2531, 76th Cong., 1st Sess., tit. II, § 209, *reprinted in Omnibus Transportation Bill: Hearings on H.R. 2531, Before the Comm. on Interstate and Foreign Commerce*, 76th Cong., 1st Sess. 9 (1939). This bill, however, died in the House.

A substitute bill, H.R. 4862, was drafted adopting the recommendations of the Committee of Six, a committee consisting of three railroad executives and three representatives of railway labor. That Committee recommended legislation:

> repealing those portions of the Interstate Commerce Act which made the regulatory body re-

> sponsible for the prescription of a general plan of consolidation for railroads, and substituting therefore provisions which will restore to the carriers all initiative in the matter, with requirement of the approval of the Transportation Board, before any proposed consolidation may lawfully be made effective, such approvals to be granted or withheld in accordance with the consolidations hereinbefore suggested, and when granted to carry with it relief from all restraints or prohibitions imposed by State or Federal Law.

Report, Committee Appointed Sept. 20, 1938 to Submit Recommendations Upon the General Transportation Situation, Dec. 23, 1938, reprinted in Omnibus Transportation Bill: Hearings on H.R. 2531 Before the Comm. on Interstate and Foreign Commerce, 76th Cong., 1st Sess. 276 (1939).

Congress, in passing section 7 of the Transportation Act of 1940, enacted a sweeping revision of section 5 of the Interstate Commerce Act in order "to facilitate merger and consolidation in the national transportation system." *County of Marin v. United States*, 356 U.S. 412, 416 (1958). As this Court stated in *Schwabacher v. United States*, 334 U.S. 182 (1948), "[the 1940 Act] authorized approval by the Commission of carrier initiated, voluntary plans of merger or consolidation if, subject to such terms, conditions and modifications as the Commission might prescribe, the proposed transactions met with certain tests of public interest, justice and reasonableness." *Id.* at 193. The revised language of section 5 "expresse[d] clearly the desire of Congress that the industry proceed toward an integrated national transportation system through substantial corporate simplification."[18] *County of Marin*, 356 U.S. at

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[18] For example, paragraph (2)(a) of the Act authorized the consolidation or merger of two or more carriers, the purchase or lease of property or acquisition of control of one carrier by another, and the acquisition of control of a carrier by a non-carrier. The Transportation

417-18. The Act strengthened the previous exemption provisions by providing in section 7, paragraph (11) (hereinafter referred to as "section 5(11) of the 1940 Act") that the Commission's jurisdiction over transactions such as mergers was "exclusive and plenary."[19] As this Court stated in *Seaboard Air Line Railroad v. Daniel*, 333 U.S.

Act of 1940, Pub.L.No. 785, ch. 722, § 7(2)(a), 54 Stat. 899, 905 (1940); see *County of Marin*, 356 U.S. at 418.

[19] Section 5(11) of the Transportation Act of 1940 provided:

> "(11) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in a[ny] resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

The Transportation Act of 1940, Pub.L.No. 785, ch. 722, § 7(11), 54 Stat. 899, 908 (1940).

118 (1948), this amendment to section 5(11) constituted "additional proof" of Congress' intent to grant adequate power to the Commission to override laws that might interfere with efficient and economical railroad operation. *Id.* at 125.

Section 7, paragraph (2)(f) of the Transportation Act of 1940 (hereinafter referred to as "section 5(2)(f) of the 1940 Act") also provided protection for railroad employees adversely affected by "transactions," mergers, consolidations, acquisitions of control, leases, and acquisitions of trackage rights.[20] Prior to the enactment of the 1940 Act, there was no statutory provision specifically requiring the protection of employees affected by consolidations of railroad facilities.[21]

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[20] Section 5(2)(f) provides as follows:

> As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

The Transportation Act of 1940, Pub.L.No. 785, ch. 722, § 7(2)(f), 54 Stat. 899, 906-07 (1940).

[21] As the Court stated in *Railway Labor Executives' Ass'n v. United States*, 339 U.S. 142 (1950):

During the debate in Congress on section 5(2)(f) and labor protection issues arising out of consolidations, Representative Harrington offered the following amendment to section 5(2)(f):

> *Provided* however that no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees.

84 Cong. Rec. 9882 (1939). The Harrington Amendment was contained in the House substitute bill that went to conference on July 27, 1939. The Interstate Commerce Commission, however, in a January 29, 1940 letter to the Chairman of the Senate and House Committees on Interstate Commerce, strenuously objected to the Harrington Amendment, stating:

> As for the [Harrington Amendment], the object of unifications is to save expense, usually by saving of labor. Employees who may be displaced should, in the case of railroad unifications, be protected by some such plan as is embodied in the so-called 'Washington Agreement' of 1936 be-

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The precursor of [Section 5(2)(f)] was § 5(4)(b), as amended by the Emergency Railroad Transportaion Act of 1933. That section authorized the Commission to approve consolidations 'upon the terms and conditions . . . found to be just and reasonable.' There was, however, a widespread awareness in the railroad industry that many of the economies to be gained from consolidations or abandonments could be realized only at the expense of displaced railroad labor. The interests of such employees were recognized in the Washington Job Protective Agreement of 1936. This was a collective bargaining contract approved by about 85% of the railroad carriers and 20 of the 21 railroad brotherhoods. It contained a schedule of substantial financial benefits recommended for employees adversely affected by consolidations or so-called 'coordinations.' *Id.* at 147 (footnotes omitted).

> tween the railroad managements and labor organizations. The proviso, by prohibiting any displacement of employees, goes much too far, and in the long run will do more harm than good to the employees. In these days of intense competition from other forms of transportation, the railroads must, if they are to thrive and grow, conduct their operations with the utmost possible economy and efficiency. If they are prevented from doing this, further shrinkage of operations and continuing loss of employment are inevitable.

Interstate Commerce Commission, 76th Cong., 1st Sess., Report on S.2009, Omnibus Transportation Legislation 67 (House Comm. Print 1940).

After a lengthy conference, on April 26, 1940, the conferees agreed on a bill that followed the form of the House Amendment but did not contain the Harrington Amendment. *See* H.R. Rep. No. 2016, 76th Cong., 3d Sess. 16 (1940); 86 Cong. Rec. 5879-80 (1940). The House voted to recommit the bill with instructions to its conferees to insist on the Harrington Amendment. 86 Cong. Rec. 5886 (1940). After further consideration, the conferees then reported out the bill a second time with a substitute for the Harrington Amendment. The bill became the Transportation Act of 1940.[22]

As this Court stated in *Railway Labor Executives' Ass'n v. United States*, 339 U.S. 142 (1950):

> The Harrington Amendment thus introduced a new problem. Until it appeared, there had been substantial agreement on the need for consolidations, together with a recognition that em-

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[22] The bill was passed by the House on August 12, 1940, 86 Cong. Rec. 10194 (1940), and by the Senate on September 9, 1940, 86 Cong. Rec. 11766 (1940). It was signed by the President on September 19, 1940, 86 Cong. Rec. 12290 (1940).

> ployees could and should be fairly and equitably protected. This amendment, however, threatened to prevent all consolidations to which it related.

Id. at 151.

The defeat of the Harrington Amendment confirmed Congress' intent to allow carriers to implement consolidations irrespective of the fact that the Commission's approval might result in the alteration of working conditions and work rules for certain employees, as long as these employees were compensated fairly under the Commission's labor protective conditions. As this Court has held, section 5(2)(f) does not freeze jobs; it merely provides compensatory conditions for employees adversely affected by approved transactions. *Norfolk & Western Railway v. Nemitz*, 404 U.S. 37, 42 (1971); *Brotherhood of Maintenance of Way Employees v. United States*, 366 U.S. 169, 176 (1961).[23]

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[23] The labor protective conditions themselves have undergone other changes since the Transportation Act of 1940 was enacted. Section 402(a) of the Railroad Revitalization and Regulatory Reform Act of 1976 ("4R Act") amended section 5(2)(f) to require that the "fair and equitable arrangement to protect the interests of the railroad employees affected" by an ICC-authorized transaction "contain provisions no less protective of the interests of employees than those heretofore imposed pursuant to [section 5(2)(f)] and those established pursuant to section 565 of Title 45 [Section 405 of the Rail Passenger Service Act]." The Railroad Revitalization and Regulatory Reform Act of 1976, Pub.L.No. 94-210, § 402(a), 90 Stat. 31, 62 (1976). The changes in the Commission's standard protective conditions necessitated by the 4R Act are described in *New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979). However, as the Commission noted in this proceeding:

> [T]he 4R Act did not limit our authority to exempt a transaction from the RLA. Rather, the 4R Act specified standards for the minimum level of employee protection to be imposed as conditions to the approval of certain transactions. Those standards, however, do not require preserving rights under the RLA. Affected carrier employees have rights imposed pursuant to 49 U.S.C. 11347.

App. at A43.

Thus, section 11341(a)—and its predecessors, section 5(11) of the 1940 Act, section 5(15) of ERTA, and section 5(8) of the 1920 Act—have had an immutable meaning.[24] Although the forms and circumstances of the transactions subject to ICC jurisdiction have changed, one principle has remained constant: parties to approved transactions should be free of the constraints of all other law, including the Railway Labor Act, that would forestall implementation of the transactions.

2. The Court of Appeals ignored the language and legislative history of section 11341 and misinterpreted this Court's decisions in refusing to uphold the ICC's grant of exemption from the Railway Labor Act.

The Court of Appeals was oblivious to the inevitability of RLA procedures forestalling implementation of the transaction. Under section 6 of the Railway Labor Act, a party proposing to change "rates of pay, rules, or working conditions" must give notice to the other side and then negotiate over the proposed changes. 45 U.S.C. § 156 (1982). If an agreement is not reached, negotiation continues under the auspices of a mediator appointed by the National Mediation Board unless and until the Board determines that an unresolvable impasse has been reached. *Id.* § 155. At that point, the Board attempts to induce the parties to submit the dispute to voluntary arbitration under 45 U.S.C. § 157. *Id.* § 155. If either party refuses arbi-

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[24] Section 5(11) was unchanged (except for recodification as section 11341(a)) from 1940 until 1982, with enactment of the Bus Regulatory Reform Act. *See* Bus Regulatory Reform Act of 1982, Pub.L.No. 97-261, § 21(a)(1), 96 Stat. 1102, 1122 (1982), extending the section to exempted as well as approved transactions under subchapter 113. Significantly, the Railroad Revitalization and Regulatory Reform Act of 1976 ("4R Act"), which effected one of the most comprehensive overhauls of the Interstate Commerce Act since its original enactment in 1887, did not amend section 5(11) in any respect. *See* The Railroad Revitalization and Regulatory Reform Act of 1976, Pub.L.No. 94-210, § 403(a), 90 Stat. 31, 63 (1976).

tration, the Board withdraws from the dispute and releases its jurisdiction.

Both carriers and unions are obligated to exhaust the section 6 procedures and to maintain the status quo, with respect to the proposed changes, throughout this entire period, and either party may seek and obtain injunctive relief against actions by the other that are in violation of the status quo requirement. *See Detroit & Toledo Shore Line Railroad v. UTU*, 396 U.S. 142, 155 (1969). Thereafter,[25] both parties are free to resort to self help: the union may lawfully strike and the carriers may unilaterally institute the proposed changes in rates of pay, rules, and working conditions. *See Railway Clerks v. Florida East Coast Railway*, 384 U.S. 238 (1966); *Brotherhood of Locomotive Engineers v. Baltimore & Ohio Railroad*, 372 U.S. 248, 291 (1963).

The Court of Appeals misapplied the plain language of section 11341. Rather than focusing on whether the RLA *procedures* could frustrate implementation of the approved transaction, the Court of Appeals concentrated on whether the selection of the *crews* could frustrate implementation of the transaction. App. at A16-A17. It then erroneously found that the crewing issue was not a material element of the transaction. The latter finding was incorrect, see *infra* pp. 39-40, but more importantly, the question whether MKT's trackage rights operation could be conducted successfully with MP crews is wholly beside the point. The critical fact is that MKT's entire trackage rights transaction could be frustrated if MP crews were given the right to *bargain* with MP over MKT's crewing, because

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[25] In cases where the dispute threatens substantially to interfere with interstate commerce, at the end of a 30-day cooling-off period a Presidential Emergency Board may be appointed to make a report recommending a solution of the dispute. 45 U.S.C. § 160 (1982). The status quo requirement in such a case continues until 30 days after the Emergency Board has submitted its report. *Id.*

MP employees could strike the MP and shut down MKT's trackage rights operation if they did not agree with MP's proposal for crewing. This is hardly a remote possibility in light of the fact that a threatened strike over this issue already has taken place, and in light of MP's employees' self-interest in impeding a competitive operation.

As the Eighth Circuit held in *Missouri Pacific Railroad v. UTU* when it upheld an injunction that had been issued against UTU to prohibit a threatened strike over the failure of MP to bargain with it concerning crewing the MKT trackage rights operation:

> [A]llowing UTU to strike would be tantamount to saying that UTU has carte blanche authority to frustrate and avoid a material term of a consolidation approved by the ICC. Congress did not intend that affected employees have such power to block consolidations which are in the public interest.

782 F.2d at 112.

In refusing to uphold the ICC's exemption, the Court of Appeals concluded that the Commission could waive only laws creating obstacles to transactions approved by it. It relied on three decisions of this Court that assertedly supported its view. *See* App. at A14; *see also Callaway v. Benton*, 336 U.S. 132 (1949); *Seaboard Air Line Railroad v. Daniel*, 333 U.S. 118 (1948); *Texas v. United States*, 292 U.S. 522 (1934).

Judge MacKinnon ably highlighted the majority's erroneous reasoning. He noted that *Callaway* arose under Section 77 of the Bankruptcy Act (formerly 11 U.S.C. § 205) rather than under the merger provisions of the Interstate Commerce Act, and "[i]n its only comment relevant to this case," the *Callaway* Court indicated merely that nothing in its opinion should be read to derogate its prior opinions upholding the ICC's power "to *override* state laws inter-

posing obstacles in the path of otherwise lawful plans of reorganization." App. at A28; *see Callaway*, 336 U.S. at 140-41. Similarly, *Seaboard* failed to support the majority's opinion. The Court in that case acknowledged the ICC's power to override laws that *may* interfere with approved transactions. *See* App. at A28-A29; *see also Seaboard*, 333 U.S. at 125-26. That language alone vitiates the "obstacle" standard created by the majority in the case below.

Finally, *Texas v. United States* is also misinterpreted by the majority. As Judge MacKinnon correctly observed, the Court in that case emphasized that one purpose of the immunity provision was to promote economy and efficiency by removing burdens created by state laws. App. at A30; *see also Texas v. United States*, 292 U.S. at 534-35. This reasoning is far removed from the majority's holding that a statute *must* create an obstacle to a transaction before an exemption may be granted.

By holding that the ICC may exempt carriers only from laws that pose obstacles to a successful implementation of approved transactions, and by failing to find that RLA procedures could frustrate implementation of the transaction, the Court of Appeals has ignored the clear meaning of the language of 49 U.S.C. § 11341 and has rendered a decision that is inconsistent with numerous decisions of this Court.

B. The Commission Is Not Required To Make Specific Findings Under Section 11341 In Order To Exempt Carriers From Laws That Could Frustrate The Implementation Of Transactions Under Sections 11343 And 11344

The ICC long has maintained:

> The terms of section 11341 immunizing an approved transaction from any other laws are self-executing and there is no need for us expressly to order or to declare that a carrier is specifically relieved from certain restraints.

App. at A44. *See, e.g., Railway Express Agency, Inc., Notes*, 348 I.C.C. 157, 215 (1975); *Ex Parte No. 260, Revised Regulations Governing Officers*, 336 I.C.C. 679, 681-82 (1970); *Texas Turnpike Authority—Abandonment—St. Louis Southwest Railway Co. of Texas*, 328 I.C.C. 42, 46 (1965). In the case at bar, the Court of Appeals rejected this interpretation of section 11341. It found:

> I.C.C. has given no justification for a view that waiver of the Railway Labor Act is necessary to effectuate the transactions at issue. Indeed, the evidence in the record strongly suggests the contrary conclusion. The Commission therefore exceeded its authority when it claimed to have waived the Railway Labor Act regarding crew selection.

App. at A17. This finding is directly at odds with decisions of this Court.

The seminal case exploring the interrelationship of the exemption provisions of section 5(11) and the merger approval provisions of section 5(2) of the Interstate Commerce Act is *Schwabacher v. United States*, 334 U.S. 182 (1948). In that case, the Court held:

> [A]pproval of a voluntary railroad merger is dependent upon three, and upon *only* three, considerations: First, a finding that 'it will be consistent with the public interest' (§ 5(2)(b).) Second, a finding that, subject to any modification made by the Commission, it is 'just and reasonable' (§ 5(2)(b).) Third, assent of a 'majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote' (§ 5(11).)

Id. at 194 (emphasis added).

The Court then stated:

> When these conditions have been complied with, the Commission-approved transaction goes into effect without need for invoking any approval under state authority, and the parties are relieved of 'restraints, limitations, and prohibitions of law, Federal, State or municipal, insofar as may be necessary to enable them to carry into effect the transactions. . . .'

Id. at 194-95. Thus, *Schwabacher* stands for the proposition that if the Commission makes the findings required by 49 U.S.C. § 11344, as it undeniably did in this case, the exemption provisions of section 11341(a) *automatically* apply to enable the carriers to effect the transaction.

Prior to *Schwabacher*, the Court examined the Commission's power to exempt carriers participating in approved merger transactions from the requirements of the antitrust laws. In *McLean Trucking Co. v. United States*, 321 U.S. 67 (1944), the Court ruled that the policies of the antitrust laws must be reconciled with the policies of the Interstate Commerce Act in the Commission's *public interest* analysis under section 5. *Id.* at 87. Similarly, in *Minneapolis & St. Louis Railway v. United States*, 361 U.S. 173 (1959), the Court stated:

> [A]lthough § 5(11) does not authorize the Commission to 'ignore' the antitrust laws, *McLean Trucking Co. v. United States*, 321 U.S. 67, 80, . . ., there can be 'little doubt that the Commission is not to measure proposals for [acquisitions] by the standards of the antitrust laws.' The problem is one of accommodation of § 5(2) and the antitrust legislation. The Commission remains obligated to 'estimate the scope *and* appraise the effects of the curtailment of competition which will result from the proposed [acquisition] and consider them along with the advantages of improved service [and other matters in the public

> interest] to determine whether the [acquisition] will assist in effectuating the over-all transportation policy.' 321 U.S. at 87.

Id. at 186.

All of the decisions of this Court have held that an analysis of the conflicting statutes is required in determining whether the transaction is in the public interest. Congress, by enacting section 11344(b)(1)(D), requires the Commission to consider the interests of employees in that public interest analysis. In the instant case, the ICC considered at length the impact these transactions would have on employees in making its public interest findings in its original decision, 366 I.C.C. at 618-22, and this aspect of its decision was upheld by the Court of Appeals, *Southern Pacific Transportation Co. v. I.C.C.*, 736 F.2d 708, 725 (D.C. Cir. 1984) (per curiam), *cert. denied*, 105 S.Ct. 1172 (1985). Under these circumstances, the Commission was not required to make specific findings of necessity under section 11341, and the Court of Appeals erred when it required such findings in this case.

C. Assuming *Arguendo* That Specific Findings Of Necessity Are Required Under Section 11341 Before Exemption Authority Can Be Exercised, Findings In The Case At Bar Were Sufficient To Justify An Exemption From The Railway Labor Act

In *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156 (1962), the Court held that an administrative agency must "disclose the basis of its order" and give clear indication that it has exercised the discretion with which Congress had empowered it. *Id.* at 167-168. The agency must make findings that support its decision, and those findings must be supported by substantial evidence. *Id.* at 168. In this case, the ICC made sufficient findings to support its decision to exempt MKT and MP from the requirements of the Railway Labor Act.

We need only repeat Judge MacKinnon's assessment of the Commission's findings:

> The ICC specifically found that the trackage rights were needed to offset the anticompetitive harms created by the consolidation. 366 I.C.C. 459, 566-579. This court has affirmed this aspect of the ICC's decision. *Southern Pacific Transportation v. ICC*, 736 F.2d 708 (D.C. Cir. 1984) (per curiam), *cert. denied*, ___ U.S. ___, 105 S.Ct. 1172, 84 L.Ed.2d 322 (1985). But the ICC did not approve the trackage rights in the abstract; rather, it approved, pursuant to this 'necessity' finding, the trackage rights as applied for by the Katy and the Rio Grande.
>
> The ICC cannot bootstrap any exemption to its approval of transactions without justification. But this is far from such a case, since the necessity for the waiver is clear. The whole point of granting the trackage rights applications was to reduce the anticompetitive effects of the consolidation (J.A. 169). Under the ICC's decision the Katy and the Rio Grande will be handling traffic for their own accounts, not for the consolidated UP-Missouri Pacific-Western Pacific (*Id.*). Thus, the trackage rights operations were meant to be conducted *in competition with* the merged UP-Missouri Pacific-Western Pacific operations, *Id.*, and to offset to some extent the monopolistic effects of that enormous consolidation. The majority opinion gives short shrift to the essential reasons for the ICC's decision. To be sure, the Commission's goal of preservation of competition through the grant of trackage rights might well be frustrated by the prospect of requiring the railroads granted those rights to negotiate with the union representing the employees of its *competitors*. It

> is no surprise the Commission did not feel compelled to spell out specifically such a proposition.

App. at A32 (footnote omitted). Furthermore, the Commission incorporated by reference the discussion of the Court of Appeals in *Brotherhood of Locomotive Engineers v. Chicago & North Western Railway*, 314 F.2d 424, 430-31 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963), to bolster its conclusion that an exemption from the RLA was warranted. App. at A44. The Commission's reasoning may "reasonably be discerned," and should be upheld by the Court. *See Bowman Transportation, Inc. v. Arkansas Freight System, Inc.*, 419 U.S. 281, 285-86 (1974).

VII.

CONCLUSION

Missouri-Kansas-Texas Railroad Company respectfully

requests the Court to reverse the Court of Appeals' decision.

Respectfully submitted,

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Nos. 85-792 and 85-793

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, PETITIONER

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA

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QUESTION PRESENTED

Whether the Interstate Commerce Commission's approval of a transaction under the rail consolidation provisions of the Interstate Commerce Act, 49 U.S.C. (& Supp. II) 11341-11351, is sufficient to exempt a party to the transaction from provisions of the Railway Labor Act "as necessary to let that person carry out the transaction" (49 U.S.C. 11341(a)) without a specific Commission finding that the exemption is "necessary."

PARTIES TO THE PROCEEDINGS

The petitioner in No. 85-792 is the Interstate Commerce Commission and the petitioner in No. 85-793 is the Missouri-Kansas-Texas Railroad Company. The following were also parties in the court of appeals:

Denver & Rio Grande Western Railroad Company;
Union Pacific Railroad Company;
Missouri Pacific Railroad Company;
Brotherhood of Locomotive Engineers;
United Transportation Union; and
United States of America.

The Association of American Railroads and the National Railway Labor Conference participated as amici curiae in support of the petitions for rehearing and suggestions for rehearing en banc.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-41a)[1] is reported at 761 F.2d 714. The opinions of

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 85-792.

the Interstate Commerce Commission (Pet. App. 51a-54a, 55a-68a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 42a-43a) was entered on May 3, 1985. Petitions for rehearing were denied on August 9, 1985 (Pet. App. 48a-50a). The petitions for a writ of certiorari were filed on November 7, 1985 and granted on March 24, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See 28 U.S.C. 2350(a).

STATUTES INVOLVED

Relevant provisions of the Interstate Commerce Act, 49 U.S.C. 11341, 11343; 49 U.S.C. (& Supp. II) 11344, 11347, and the Railway Labor Act, 45 U.S.C. 156 and 157, are set out at Pet. App. 69a-82a.

STATEMENT

The Interstate Commerce Commission has broad authority to examine, condition, and approve proposed rail carrier consolidations. In 1982, the Commission approved a major consolidation of the Union Pacific (UP), Missouri Pacific (MP), and Western Pacific (WP) railroad companies, requiring, among other conditions, that those railroads grant trackage rights to their competitors, the Missouri-Kansas-Texas Railroad Company (MKT) and the Denver & Rio Grande Western Railroad Company (DRGW), to ameliorate anti-competitive effects of the merger. This case presents a question arising from the trackage rights transactions.

MKT and DRGW each proposed, and the Commission approved, trackage rights agreements that reserved the rights of MKT and DRGW to conduct op-

erations using their own crews. Months after the Commission approved the consolidation and the trackage rights transactions, the Brotherhood of Locomotive Engineers (BLE) and the United Transportation Union (UTU)—respondent labor unions representing employees of MP—objected to the crewing plans. BLE and UTU contended that they had an established right, as representatives of MP's employees, to participate in crew assignment determinations when MP's tracks are used by other carriers, and that those rights could not be changed except in accordance with the Railway Labor Act (RLA), 45 U.S.C. 156, 157.

The Commission found no evidence that the unions had any established right to participate in determining crews of other railroads operating over MP's tracks. It also held that, in any event, its approval of the trackage rights transaction was dispositive: MKT's and DRGW's reservation of the right to crew their own trains was a clearly stated term of their trackage rights proposals and, under the relevant provision of the Interstate Commerce Act (ICA), 49 U.S.C. 11341(a), the Commission's approval automatically exempted the carriers participating in the trackage rights transactions from any conflicting requirements imposed by the RLA. The unions petitioned for judicial review, and a divided court of appeals vacated the Commission's decision. The majority ruled that Section 11341(a) does not automatically exempt carriers participating in approved transactions from inconsistent provisions of other laws and that the Commission "must explain why termination of the [Union's] asserted right to participate in crew selection is necessary to effectuate" the Commission-approved trackage rights transactions (Pet. App. 45a).

A. The Statutory Framework

Chapter 113 of the Interstate Commerce Act, 49 U.S.C. (& Supp. II) 11301 *et seq.*, vests the Interstate Commerce Commission with exclusive and plenary jurisdiction to examine, condition, and approve rail carrier combinations, including the consolidation of two or more carriers (49 U.S.C. 11343(a)(1)) and the acquisition of trackage rights by one carrier over the lines of another (49 U.S.C. 11343(a)(6)). The statutory provisions grant the Commission broad authority to evaluate the effects of these transactions on interested persons and the public. See 49 U.S.C. (& Supp. II) 11341-11351.

Section 11344(c) provides that upon application of the parties, the Commission may conduct a proceeding and "shall approve and authorize a transaction under this section when it finds that the transaction is consistent with the public interest." 49 U.S.C. 11344(c). That section identifies specific criteria, including "the interests of carrier employees affected by the proposed transaction" (49 U.S.C. 11344(b)(1)(D)) and "whether the proposed transaction would have an adverse effect on competition" (49 U.S.C. 11344(b)(1)(E)), to guide the Commission's consideration. 49 U.S.C. 11344(b).[2] Section 11344(c) also provides

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[2] Section 11344(b) instructs that in situations, as here, involving the merger or control of at least two Class I railroads, the Commission shall consider "at least" the following factors (49 U.S.C. 11344(b)(1)):

> (A) the effect of the proposed transaction on the adequacy of transportation to the public;
>
> (B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transactions;

that the Commission "may impose conditions governing the transaction." 49 U.S.C. 11344(c).

Section 11347 provides that the Commission shall impose conditions to protect the interests of railroad employees who are adversely affected by an approved transaction. 49 U.S.C. (Supp. II) 11347. The Commission has formulated standard labor protective conditions that govern consolidations (New York Dock conditions) and the grant of trackage rights (Norfolk & Western conditions).[3] These conditions ensure that

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(C) the total fixed charges that result from the proposed transaction;

(D) the interest of carrier employees affected by the proposed transaction; and

(E) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region.

[3] See *New York Dock Ry.—Control—Brooklyn Eastern District Terminal*, 360 I.C.C. 60, aff'd *sub nom. New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979); *Norfolk & W. Ry.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified by *Mendocino Coast Ry.—Lease & Operate*, 360 I.C.C. 653, 664 (1980), aff'd *sub nom. Railway Labor Executives' Ass'n* v. *United States*, 675 F.2d 1248 (D.C. Cir. 1982). These conditions generally provide that an employee who is dismissed from his job or placed in a lower paying position as a result of the approved transaction will continue, for a period of years, to receive the equivalent of the wages he received prior to displacement. The employee must accept available work and will receive moving expenses if relocation is necessary. Work transfers are effected through negotiations between the carrier and the union, which, in turn, are subject to binding arbitration.

The railroad industry's use of labor protective provisions originated in the Washington Job Protection Agreement of

transactions found to be in the public interest can be consummated without labor strife by providing a "fair arrangement" (49 U.S.C. (Supp. II) 11347) for displaced employees.[4]

When the Commission has approved a transaction, the statute exempts the participants from any federal, state, or local law that would interfere with their carrying out the transaction or conducting business pursuant to it. Section 11341(a) provides (49 U.S.C. 11341(a)):

> A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold,

---

1936, a voluntary agreement between industry and labor. Congress later amended former Section 5(2)(f) of the ICA to provide that the ICC must impose labor protective conditions when approving rail consolidations. See Transportation Act of 1940, ch. 722, § 7, 54 Stat. 905. The statutory provisions have since been amended and recodified in their present form. See 49 U.S.C. (Supp. II) 11347. The rather complicated history of labor protective provisions is recounted in *New York Dock Ry.* v. *United States*, 609 F.2d at 86-90.

[4] The conditions devised by the Commission under Section 11347 for application to approved transactions stand in sharp contrast to the RLA's much more cumbersome work change procedures. Under the RLA, an attempt to change collective bargaining agreements results in a "major dispute." *Elgin, J. & E. Ry.* v. *Burley*, 325 U.S. 711, 723 (1945). The parties to the dispute must engage in a protracted procedure to resolve their differences, which includes negotiation, mediation, voluntary arbitration, and conciliation. See 45 U.S.C. 156, 157. If the parties are unable to reach an agreement, either party may resort to economic self-help such as a lock-out or strike. See generally *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 378-380 (1969).

maintain, and operate property, and exercise control or franchises acquired through the transaction.

This provision exempts a Commission-approved consolidation or grant of trackage rights from legal obstacles that would otherwise bar or impede its implementation.

B. The Union Pacific Consolidation and the Grant of Trackage Rights to MKT and DRGW

The present dispute arises out of the Commission's approval of the consolidation of the Union Pacific, Missouri Pacific, and Western Pacific railroad companies, subject to various competition and labor protective conditions. *Union Pacific Corp., Pacific Rail System, Inc. & Union Pacific R.R.—Control—Missouri Pacific Corp. & Missouri Pacific R.R.* (*UP-Control-MP*), 366 I.C.C. 462 (1982). MKT and DRGW proposed, and the Commission approved, trackage rights agreements that would permit those railroads to conduct operations over MP tracks. As the record in the Commission proceeding demonstrates, the participants—including BLE and UTU—fully understood that MKT and DRGW had reserved the right to use their own crews for operation of their trains over MP lines.

Union Pacific Corporation filed its application for Commission approval of the consolidation on September 15, 1980. *UP-Control-MP*, 366 I.C.C. at 471 (Finance Docket No. 30,000). A number of railroads (including MKT and DRGW), labor unions (including BLE and UTU), and other entities objected and sought Commission-imposed conditions (*id.* at 562-625). MKT claimed that the merger would have serious anticompetitive effects and proposed that it be

given the right to run its trains on MP tracks to preserve its competitive capabilities (*id.* at 566). DRGW made a similar claim and also proposed that it have the right to use MP lines (*id.* at 572). The MKT and DRGW proposals each specifically stated that the tenant railroad would have the right to supply its own crews when operating trains on MP tracks.[5] BLE and UTU requested labor protective conditions for both the UP-MP-WP primary transaction and the MKT and DRGW trackage rights requests. However, the unions did not oppose the MKT and DRGW proposals as to crewing. See Pet. App. 61a-65a.

The Commission held hearings on the proposed consolidation from March 1981 to January 1982. MKT and DRGW witnesses explained the basis for their trackage rights proposals (see Pet. App. 63a-64a). Neither BLE nor UTU challenged the MKT and DRGW proposals to use their own crews to conduct trackage rights operations (*ibid.*), and neither union suggested that it would be entitled to a voice in the MKT and DRGW crew selections (*id.* at 64a-

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[5] MKT's proposed trackage rights agreement, filed in January 1981, stated that "MKT, with its own employees, and at its sole cost and expense, shall operate its engines, cars and trains on and along Joint Track." Proposed Trackage Rights Agreement § 5, Finance Docket No. 30,000 (Sub.-No. 25). See Pet. App. 62a. DRGW's proposed trackage rights agreement, also filed in January, 1981, stated that "Rio Grande may, at its option, elect to employ its own crews for the movement of its trains, locomotives and cars to points on or over the Joint Track." Proposed Trackage Rights Agreement § 6(c)(3), Finance Docket No. 30,000 (Sub.-No. 18). See Pet. App. 62a. On February 20, 1981, MKT and DRGW filed verified statements supporting their trackage rights applications that further indicated their intentions to use their own crews (*id.* at 62a-63a).

65a). Following the hearings, the parties submitted briefs stating their positions. Again, neither BLE nor UTU challenged the proposal of MKT and DRGW to use their own crews when operating their trains over MP tracks (*id.* at 65a).

On October 20, 1982, the Commission served its order approving the UP-MP-WP consolidation and partially approving the MKT and DRGW trackage rights proposals, both subject to various conditions. *UP-Control-MP*, 366 I.C.C. at 653-655. The Commission approved MKT's "north-end" trackage rights proposal, authorizing MKT to use MP tracks in Iowa, Kansas, Missouri, and Nebraska, but denied approval of MKT's "St. Louis" trackage rights proposal, involving trackage in Missouri, and its "south-end" proposal, involving MP trackage in Texas. 366 I.C.C. at 566-572. The Commission approved DRGW's proposal for trackage rights over MP tracks between Pueblo, Colorado and Kansas City, Missouri. 366 I.C.C. at 572-578. Approval of the consolidation was conditioned on the grant of the trackage rights by the consolidating carriers. The Commission imposed standard labor protective conditions (see note 3, *supra*) on the consolidation transaction and the trackage rights transactions. 366 I.C.C. at 618-622.

Numerous parties sought judicial review of the Commission decision; however, neither BLE nor UTU challenged the MKT and DRGW trackage rights transactions or the terms of those transactions giving MKT and DRGW the right to use their own crews. The Commission's decision was affirmed in all relevant respects. *Southern Pacific Transportation Co.* v. *ICC*, 736 F.2d 708 (D.C. Cir. 1984), cert. denied, No. 84-621 (Feb. 19, 1985).

C. The Present Dispute

The UP-MP-WP consolidation was consummated on December 22, 1982. See *Missouri Pacific R.R.* v. *United Transportation Union*, 580 F. Supp. 1490, 1495 (E.D. Mo. 1984), aff'd, 782 F.2d 107 (8th Cir. 1986). See 85-792 Pet. Add. 6a.[6] On December 31, 1982, MP informed its employees' representatives that MKT would soon begin trackage rights operations on MP lines and that " '[n]o Missouri Pacific employees will be adversely affected as a result of the utilization of these trackage rights * * *' " (*ibid.*). UTU objected to the MKT operations by a letter dated January 4, 1983, stating that " 'it is our position that any and all service operated northward on Missouri Pacific tracks out of Kansas City, Missouri be protected by Missouri Pacific (Proper) road crews' " (*ibid.*). Meanwhile, MKT, consistent with its trackage rights proposal, entered into crewing agreements with its employees. Shortly thereafter, MKT commenced operations over MP tracks using its own crews (*ibid.*).[7]

On March 28, 1983, UTU officials accused MP of permitting a " 'trespass on [their] collectively bar-

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[6] Because the *Missouri Pacific* decision is closely related to the present dispute, the Commission reproduced it in full as an addendum to its petition (85-792 Pet. Add. 1a-39a). UTU petitioned for a writ of certiorari before judgment while that case was pending before the Eighth Circuit. See *United Transportation Union* v. *Missouri Pacific R.R.*, No. 85-1054, noting its close relationship to the present case (85-1054 Pet. at 2-3). The Eighth Circuit later affirmed the decision. 782 F.2d 107 (1986).

[7] DRGW, consistent with its proposal, decided to use MP employees temporarily in exercising its trackage rights (Pet. App. 8a).

gained agreements * * * by non-Missouri Pacific employees'" (85-792 Pet. Add. 7a). UTU stated that it would initiate a strike against MP if MKT crews continued to conduct operations over MP track without UTU consent. On March 30, 1983, MP sought and received a temporary restraining order—and, later, an injunction—prohibiting UTU's threatened strike (*id.* at 7a-8a, 32a).[8]

Meanwhile, on April 4, 1983, BLE filed a "Petition for Clarification" requesting the Commission to clarify "its intent as to the crew manning or assignments of the trains to be operated by [MKT and DRGW]" under the Commission approved trackage rights (C.A. App. 2). The petition stated that "[i]t is * * * necessary that the Commission clarify the intent of its order and inform the parties as to the method available to resolve any dispute as to crew manning and the extent to which [DRGW] and MKT may use their crews to operate trains over the lines of [MP]" (*id.* at 5). On May 12, 1983, the Commission denied the petition, finding no need for clarification (Pet. App. 51a-54a). The Commission stated that "[i]nasmuch as DRGW and MKT proposed in their applications that the operations would

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[8] The district court concluded that the Commission's approval of the trackage rights transactions exempted MP from "any requirement of the RLA" to negotiate over crew selection (85-792 Pet. Add. 23a). The court emphasized (*id.* at 28a):

> [A]llowing UTU to strike would be tantamount to saying that UTU has carte blanche authority to frustrate and avoid a material term of a consolidation approved by the ICC. Congress did not intend that affected employees have such power to block consolidations which are in the public interest.

The decision was affirmed on appeal. 782 F.2d 107 (8th Cir. 1986).

be performed with their own crews, our approval of the applications authorizes such operations" (*id.* at 54a). The Commission also noted that it had "unambiguously specified that trackage rights tenants may perform operations using their own crews" in other recently issued decisions dealing with DRGW's trackage rights. *Ibid.* (footnote omitted); see Pet. App. 8a-9a.

On May 31, 1983, BLE and UTU each filed a "Petition for Reconsideration" of the Commission's May 12, 1983 decision (C.A. App. 47-55, 71-84). The unions claimed that their established relationship with MP as representatives of its employees gave them a right to participate in decisions with respect to crewing of trains operated over MP tracks even if operated by another carrier. They argued that crew assignment disputes must be settled under the RLA and that even if Commission approval of a rail consolidation could exempt the railroads from RLA requirements, the Commission failed to make findings necessary to support the exemption. They made the further argument that the tenant railroads' use of their own crews would violate the requirement of Section 11347 of the ICA that labor receive certain protection in connection with approved consolidation transactions. See Pet. App. 57a.[9]

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[9] Neither union identified the precise source of their purported right to control the crewing of all trains exercising trackage rights over MP tracks. BLE simply stated, without further explanation, that "[t]he collective bargaining agreements in effect and the existing objective working conditions guarantee that all work performed on the lines of the Union Pacific and the Missouri Pacific be performed by their employees" (C.A. App. 53). UTU claimed, without elaboration, that "th[e] Commission has authorized MKT and DRGW to perform acts which are contrary to the Railway Labor Act—

The Commission denied the petitions for reconsideration (Pet. App. 55a-68a). The Commission rejected at the outset the union's contention that "UP-MP employees, through their bargaining agents, have the right to participate in the trackage rights crew selection process," finding the unions' argument that they had any such underlying rights "unpersuasive and unsupported by the record" (*id.* at 58a-59a, 65a). The Commission stated that "the trackage rights agreements do not involve a change in UP-MP employees' working conditions in a manner contrary to RLA requirements" (*id.* at 59a). The Commission then said that, in any event, Commission approval "exempts such a transaction from the requirements of all laws as necessary to permit the transaction to be carried out, and includes an exemption from the requirements of the RLA" (*ibid.*). The Commission also rejected the contention that its approval of a transaction exempts a railroad from the requirements of the RLA only if it first makes special findings of necessity, explaining (*id.* at 67a):

> Trackage rights agreements are considered under the criteria of 49 U.S.C. 11344 and if those criteria are met, the agreement is approved. The approval confers self-executing immunity on all material terms of the agreement from all other

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i.e., that Act's prohibition on unilateral change on [*sic*] working conditions—and to the employee protective provisions imposed in this case" (C.A. App. 77). It should be noted that any MP employee represented by BLE or UTU who might be displaced by MKT's or DRGW's exercise of trackage rights was already eligible for compensation in accordance with the Commission-imposed labor protective provisions. See note 3, *supra*. The unions claimed the *additional* right, on behalf of MP employees, to participate in the crew selection for MKT and DRGW trains. See Pet. App. 8a.

law to the extent necessary to permit implementation of the agreement.

The Commission observed that the MKT/DRGW crewing provisions, which the railroads specifically set forth when applying for trackage rights (see *id.* at 62a-65a), "are material terms of the agreement and may be implemented without any other approval" (*id.* at 67a). The Commission also explained that Section 11347 of the ICA protects labor through the imposition of labor protective conditions providing compensation to displaced employees. It does not prevent railroads from implementing changes in working conditions that are contemplated by the authorized transaction (Pet. App. 60a).

BLE and UTU sought judicial review, contending, first, that the Commission failed to make findings necessary to support the Section 11341(a) exemption from the RLA requirements and, second, that the ICA's labor protective provisions preserve the unions' purported rights to participate in MKT's and DRGW's crewing assignments. A divided court of appeals vacated the May 1983 and October 1983 decisions and remanded the case to the Commission (Pet. App. 1a-45a).

The court first addressed the timeliness of the unions' petitions for judicial review. It recognized (Pet. App. 11a-12a) that the unions were, in effect, challenging aspects of the Commission's original approval decision, served on October 20, 1982, and that the 60-day period for judicial review of that decision had long since passed. See 28 U.S.C. 2344. The court nevertheless held that the unions' challenges were timely, finding that the unions had inadequate notice that the Commission's approval of the MKT and

DRGW trackage rights proposals would permit those railroads to select their own crews (Pet. App. 12a-14a).[10]

The court then turned to the merits of the unions' claims. It concluded that the Commission's failure to make specific findings of necessity for exemption of the crewing arrangement from any conflicting requirements of the RLA was "decisive" (Pet. App. 15a).[11] The court reasoned that the Commission had misinterpreted the provision of Section 11341(a) exempting any person participating in an approved transaction from "the antitrust laws and from all other law * * * as necessary to let that person carry out the transaction." 49 U.S.C. 11341(a). The court specifically rejected the Commission's position that, upon Commission approval of the transaction pursuant to the public interest criteria set forth in 49 U.S.C. (& Supp. II) 11344, Section 11341(a) automatically exempts the participants from any legal obstacle to implementation of a material term of the transaction (Pet. App. 16a-20a).

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[10] The court stated (Pet. App. 12a (emphasis in original)):

> The Commission and the railroads argue that the trackage applications specifically noted that D&RGW *might*, and MKT *would*, use their own crews and thus there was no ripeness problem. However, those applications were bounded by ICC's general pronouncement that the labor protection conditions would not be violated. As soon as it became apparent that MKT intended to use its own crews, the unions petitioned ICC for clarification of the application of the labor protection conditions.

[11] The court therefore did not address the second question, whether the ICA's labor protective provisions preserve the unions' purported rights to participate in determining MKT's and DRGW's crewing assignments (Pet. App. 20a-21a).

The court stated that "Congress has given [the Commission] broad powers to immunize transactions from later legal obstacles, but this delegation by Congress is explicitly qualified by a necessity component" (Pet. App. 16a). The court ruled that the Commission must, in addition to approving the terms proposed by the applicants, make an express finding that an exemption is essential to the success of the transaction, stating (*id.* at 16a n.4):

> [The Commission's] decision-making process, either in the approval or in a later proceeding, must reveal evidence supporting a conclusion that waiver of a particular legal obstacle is necessary to effectuate the transaction.

The court found that the Commission's "analysis of the necessity for waiving the Railway Labor Act * * * is virtually nonexistent, both in the 1982 decision and in the 1983 decisions" (*id.* at 19a), adding that "the Commission did not give a shred of reasoning to support its view that completion of the transactions required shielding crew selection from the Railway Labor Act" (*ibid.* (footnote omitted)).

The court, vacating the Commission's decisions, stated in its amended order (Pet. App. 45a):

> On remand, to exercise its exemption authority, the Commission must explain why termination of the asserted right to participate in crew selection is necessary to effectuate the procompetitive purpose of the grant of trackage rights or some other purpose sufficiently related to the transaction.

The court also stated that "[u]ntil such a finding of necessity is made, the provisions of the Railway Labor

Act and the Interstate Commerce Act remain in force" (*ibid.*).[12]

Judge MacKinnon dissented (Pet. App. 22a-39a). He disagreed, first, with the court's determination that the unions' appeals were timely (*id.* at 22a-28a).[13] Turning to the merits, he first criticized the court's failure to examine whether the unions had underlying rights to participate in MKT's and DRGW's crew selection decisions.[14] He then rejected the majority's conclusion that the railroads' right to a Section 11341(a) exemption from the Railway Labor Act depends upon an express Commission finding that the exemption is "necessary."

Judge MacKinnon stated that "[t]he whole basis for granting the trackage rights, which included the

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[12] The court, in its initial opinion, had simply vacated the Commission decisions and left "the parties to their Railway Labor Act remedies" (Pet. App. 21a). That opinion "intimate[d] no view on the merits of the unions' claims about their underlying right to a role in crew selection" (*ibid.*).

[13] He observed, in particular, that "[t]he unions had been on notice since the day the applications for trackage rights were filed on January 13, 1981, that the railroads intended to use their own crews to operate their own trains if their applications for trackage rights were approved" (Pet. App. 26a). He also observed that, "'[a]s a general proposition, * * * if there is *any* doubt about the ripeness of a claim, petitioners must bring their challenge in a timely fashion or risk being barred.'" *Id.* at 27a (quoting *Eagle-Picher Industries* v. *EPA*, 759 F.2d 905, 914 (D.C. Cir. 1985) (emphasis in original)).

[14] He observed that the Commission "found that 'the record contains no evidence to support the contention of UTU and BLE that UP-MP employees have rights under collective bargaining agreements to participate in the crew selection process' of foreign railroads operating under trackage rights" (Pet. App. 29a-30a).

crew selection provisions, was the implicit conclusion that the granting of such rights was *necessary* to the approval of the merger" (Pet. App. 28a (emphasis in original)). He noted that this Court has repeatedly recognized the Commission's broad power to approve rail mergers that are consistent with the public interest and has treated the Section 11341(a) exemption as an attendant consequence of approval (Pet. App. 33a-38a). Finally, he observed that "the Commission's goal of preservation of competition through the grant of trackage rights might well be frustrated by the prospect of requiring the railroads granted those rights to negotiate with the union representing the employees of its *competitors*" (*id.* at 39a (emphasis in original)).

SUMMARY OF ARGUMENT

The Interstate Commerce Act gives the Interstate Commerce Commission broad authority to approve proposed railroad consolidations and trackage rights transactions that the Commission finds, after appropriate proceedings, to be consistent with the public interest. When such a transaction has been approved, the ICA itself exempts each participating carrier from all laws "as necessary to let that person carry out the transaction." 49 U.S.C. 11341(a).

The court of appeals misconstrued Section 11341 (a). Instead of treating the exemption from other laws as an automatic consequence of Commission approval, the court ruled that the Commission must make an express affirmative determination with respect to each transaction term that faces a legal obstacle. It said "[The Commission's] decision-making process, either in the approval or in a later proceeding, must reveal evidence supporting a conclu-

sion that waiver of a particular legal obstacle is necessary to effectuate the transaction" (Pet. App. 16a n.4). This construction of Section 11341(a) is inconsistent with the plain language of Section 11341, with the structure and purposes of the ICA's rail carrier consolidation provisions, and with Commission and court precedents. It would seriously impede the consummation of Commission approved rail consolidations plans.

A. The starting point for interpreting a statute is, of course, the statute itself. In this case, the statutory language is straightforward and unambiguous. Section 11344(c) provides that "[t]he Commission shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest." 49 U.S.C. 11344(c). Section 11341(a) provides that "[a] carrier, corporation, or person participating in [an] approved * * * transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction * * *." 49 U.S.C. 11341(a).

Under the statute, the Commission must determine whether a proposed consolidation is consistent with the public interest. The Commission is directed to consider specified factors, including impacts on employees and on competition. Interested persons, including labor representatives, have a right to challenge a proposal in whole or in part, and the Commission's determination is, of course, subject to judicial review. But once the proposed transaction is approved, Section 11341(a) confers an exemption of sufficient breadth to enable the parties to implement the transaction and conduct business in accordance with it. The court of appeals misspoke when it said

that "Congress has given [the Commission] broad powers to immunize transactions from later legal obstacles" (Pet. App. 16a). Congress gave the Commission authority to examine, condition, and approve transactions. The "immunization" is a statutory consequence of Commission approval.

B. The ICA's consolidation provisions have two relevant purposes: first, to leave to the carriers themselves the task of formulating and proposing transactions; and second, to expedite those transactions that are in the public interest by replacing the myriad of federal, state, and local laws otherwise affecting such transactions with a single proceeding in which the Commission approves, disapproves, or conditions the rail carriers' proposal in accordance with congressionally prescribed public interest criteria.

The court of appeals' decision defeats these purposes. It would require the Commission to determine which of the terms of a complex transaction are "necessary to effectuate" (Pet. App. 45a) the transaction, a matter that the ICA leaves largely to the business judgment of the carriers. More importantly, by requiring the Commission either to anticipate every conflict with federal, state, or local law or to pass post hoc judgments on the "necessity" of transaction terms when conflicts with other laws later appear, the court's approach would defeat the congressional goal of replacing the various federal, state, and local laws with a single approval proceeding that provides a comprehensive consideration of the public interest.

C. The decision below represents a marked departure from agency and judicial precedent. The Commission has consistently recognized that "[t]he terms of section 11341 immunizing an approved transaction from any other laws are self-executing and there is

no need for us expressly to order or to declare that a carrier is specifically relieved from certain restraints" (see Pet. App. 60a). The courts of appeals have agreed with that interpretation.

D. This case demonstrates how the court of appeals' construction of Section 11341(a) would seriously impede the express congressional policy of expediting rail consolidations that are consistent with the public interest. The Commission here approved the carriers' consolidation proposal and the trackage rights transactions after extensive review involving hundreds of witnesses and thousands of pages of testimony. MKT and DRGW expressly proposed the crew selection provisions at issue. The unions raised no objection to those provisions at that time and the Commission approved them as elements of the consolidation plan. By allowing the unions to demand a post-approval Commission "necessity" proceeding, the court has ensnared the implementation of a trackage rights transaction—which the Commission not only approved but insisted upon as a condition to its approval of the UP-MP-WP consolidation—in a tangle of legal challenges.[15]

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[15] The court of appeals did not reach the unions' claim that Section 11347 of the ICA requires the Commission to preserve their allegedly established right to crew trains operated over MP's tracks even when operated by other carriers (Pet. App. 20a-21a). There is no reason to remand this case to the court of appeals to resolve that issue. As previously noted, the Commission found no evidence to support the unions' claim that they had an established right to participate in the assignment of crews to non-MP trains that operate over MP tracks (*id.* at 58a-59a, 65a). The court of appeals did not disturb that finding. Accordingly, there is no occasion to remand this case for a determination of how the ICA's labor protective provisions would apply if those rights existed.

ARGUMENT

THE INTERSTATE COMMERCE COMMISSION'S APPROVAL OF A RAIL CARRIER TRANSACTION UNDER SECTION 11344 OF THE INTERSTATE COMMERCE ACT, 49 U.S.C. 11344, BY ITS OWN FORCE, EXEMPTS THE CARRIERS FROM PROVISIONS OF THE RAILWAY LABOR ACT THAT POSE OBSTACLES TO THE IMPLEMENTATION OF THE APPROVED TRANSACTION

The court of appeals erred in holding that the Commission's approval of a proposed transaction under Section 11344 of the ICA is insufficient to exempt a participant from the requirements of other laws—in this case the RLA—unless the Commission makes a specific finding that the exemption is necessary and explains its reasoning to the satisfaction of the reviewing court. That ruling is inconsistent with the plain language of Section 11341(a), the structure and purposes of the ICA's rail consolidation provisions, and longstanding precedent. It will seriously impede the implementation of Commission-approved transactions.[16]

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[16] We note two preliminary matters that merit brief discussion. First, as Judge MacKinnon observed (Pet. App. 22a-28a), there is reason to question the timeliness of the unions' petition to the court of appeals for judicial review. We submit that the unions' petitions were timely for the purpose of reviewing the Commission's denial of BLE's petition for clarification, but the scope of the court's review should have been limited to whether the Commission abused its discretion in concluding that the October 20, 1982 consolidation decision "does not require clarification" (Pet. App. 53a). See *Western Union Telegraph Co.* v. *FCC*, 773 F.2d 375, 380-381 (D.C. Cir. 1985). The unions should not have been permitted to use a petition for clarification (or a subsequent motion to reconsider the denial of that petition) as a wedge for reopening the

A. The plain language of Section 11341(a) of the Interstate Commerce Act indicates that persons participating in an approved transaction are automatically exempt from other laws "as necessary to let that person carry out the transaction"

The starting point for interpreting a statute is, of course, the language itself. "If the statute is clear and unambiguous 'that is the end of the matter, for the court as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *Board of Governors* v. *Dimension Financial Corp.*, No. 84-1274 (Jan. 22, 1986), slip op. 6 (quoting *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-843 (1984)).

Commission's final consolidation decision. See *National Bank of Davis* v. *Office of the Comptroller of the Currency*, 725 F.2d 1390 (D.C. Cir. 1984). Thus, the court of appeals had jurisdiction in this case; its first error lay in impermissibly expanding the scope of its review. See *United States* v. *ICC*, 396 U.S. 491, 521 (1970).

Second, the court of appeals' willingness to indulge the unions' unsupported claims that they had an established right to participate in MKT's and DRGW's crewing decisions is, as Judge MacKinnon stated, "inexplicable" (Pet. App. 29a). The Commission specifically found that "the record contains no evidence to support the contention of UTU and BLE that UP-MP employees have rights under collective bargaining agreements to participate in the trackage rights crew selection process" (*id.* at 65a). As Judge MacKinnon explained (*id.* at 29a-30a), the court plainly erred in addressing Section 11341(a)'s impact on the unions' purported rights on the presumption, based on the union's contrary contentions, that these rights existed.

Both of these errors rest, in principal part, on the court's mistaken understanding of "the interpretation to be given various Commission actions" (Pet. App. 11a; see *id.* at 20a-21a). We thus direct our arguments to the court's central mistake, its misunderstanding of the Commission's role in the Section 11341(a) exemption process.

In this instance, Congress has unambiguously stated that the Commission's approval of a rail consolidation or trackage rights transaction under the prescribed "public interest" standard automatically exempts transaction participants from federal, state, and local laws that would prevent implementation of the transaction's terms.

The statutory language is both clear and straightforward. Section 11344(c) provides that "[t]he Commission shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest." 49 U.S.C. 11344(c). Section 11341(a) then provides (49 U.S.C. 11341 (a)):

> A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.

As the statutory language indicates, the Commission must determine whether a proposed consolidation is consistent with the public interest. That determination is made on the record, after hearing the views of interested persons. See 49 U.S.C. (& Supp. II) 11344. It is guided by specific statutory criteria (49 U.S.C. 11344(b)) and is, of course, subject to judicial review (28 U.S.C. (& Supp. II) 2342). But once the proposed transaction is approved, Section 11341(a) automatically confers an exemption of sufficient breadth to permit implementation of the authorized transaction.

The court of appeals' conclusion that "Congress has given [the Commission] broad powers to immunize

transactions from later legal obstacles" (Pet. App. 16a) is inaccurate. Section 11344 gives the Commission authority to consider, condition, and approve transactions proposed by carriers. The Section 11341 (a) exemption is a congressionally prescribed consequence of Commission approval that extends as far "as necessary to let that person carry out the transaction." 49 U.S.C. 11341(a). The court of appeals' conclusion that the Commission must make supplemental findings, either in the approval proceeding or in later proceedings, that the exemption from a particular law is "necessary to effectuate" the terms of an approved transaction is also inconsistent with the plain language of the statute. Section 11341(a) says that a participant in an approved transaction "is exempt." The section makes no reference to any contemporaneous or post hoc Commission examination of each potential legal obstacle to determine whether it must be removed. The scope of the exemption is defind by the terms of the approved transaction.[17]

The language of the present Section 11341(a) and Section 11344 is consistent in this respect with statutory language that goes back more than 60 years. Congress enacted the relevant provisions of both sections as part of its recodification, without substantive

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[17] The Section 11341(a) exemption applies, of course, only to terms comprehended by the Commission's approval order. See, *e.g.*, *Chicago, St. P., M. & O. Ry. Lease*, 295 I.C.C. 696, 697, 702 (1958). There may be occasions where it is necessary for the Commission to clarify, in a post-approval proceeding, the scope or meaning of the proposal it has approved. See note 23, *infra*. This, however, is not such an occasion: crewing arrangements are plainly central to trackage rights transactions, and MKT's and DRGW's proposals on this score could hardly have been more clearly stated. See pages 43-46, *infra*.

change, of former Section 5 of the ICA. See Pub. L. No. 95-473, 92 Stat. 1337 *et seq.*; H.R. Rep. 95-1395, 95th Cong., 2d Sess. 158-168 (1978). The recodified provisions find their origins in the Transportation Act of 1920, ch. 91, 41 Stat. 456 *et seq.*, and the Transportation Act of 1940, ch. 722, 54 Stat. 898 *et seq.* See generally *St. Joe Paper Co.* v. *Atlantic Coast Line R.R.*, 347 U.S. 298, 315-321 (1954) (appendix to opinion of the Court).

Section 407 of the Transportation Act of 1920, ch. 91, 41 Stat. 480, amended Section 5 of the Interstate Commerce Act of 1887, ch. 104, 24 Stat. 380 specifically to encourage railroad consolidation. See *St. Joe Paper Co.* v. *Atlantic Coast Line R.R.*, 347 U.S. at 315-316. In particular, it added Section 5(6)(c) to authorize Commission approval of consolidations that promote the public interest. 41 Stat. 482. It also added Section 5(8) specifically to exempt participants in Commission-approved consolidations from federal and state legal obstacles. 41 Stat. 482. Section 5(8) expressly stated (41 Stat. 482 (emphasis added)):

> The carriers affected by any order made under the foregoing provisions of this section * * * *shall be, and they are hereby, relieved* from the operation of the "antitrust laws," * * * and of all other restraints or prohibitions by law, State or Federal, *in so far as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section.*

This statutory language left no doubt that the ICA's exemption provision attached automatically upon Commission approval and extended as far as necessary to ensure consummation of "anything authorized or required" by the Commission approval order. See

also H.R. Rep. 650, 66th Cong., 2d Sess. 64 (1920) ("An order of the commission approving a specified consolidation may be carried out notwithstanding any State or Federal restraining or prohibitory law to the contrary.").

Section 7 of the Transportation Act of 1940, ch. 722, 54 Stat. 905, amended and recodified Section 5 of the ICA but left the provisions relevant here substantially intact. Former Section 5(6) was subsumed within revised Section 5(2) (see 54 Stat. 905, 908) and former Section 5(8) was subsumed within revised Section 5(11) (see 54 Stat. 908-909). The operative language of revised Section 5(11) remained essentially unchanged, providing (54 Stat. 908-909 (emphasis added)):

> [A]ny carriers * * * participating in a transaction approved or authorized under the provisions of this section *shall be and they are hereby relieved* from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, *insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission* * * *.

This language, like that of the 1920 Act, plainly provided that express terms of a Commission-approved transaction were automatically exempted from preexisting legal obstacles. When Congress recodified this language in the present Section 11341(a) of the ICA, it effected no substantive change. Pub. L. No. 95-473, § 3(a), 92 Stat. 1466; *Trailer Marine Transport Corp.* v. *FMC*, 602 F.2d 379, 383 n.18, 384 (D.C. Cir. 1979). See H.R. Rep. 95-1395, *supra*, at 158-160.

Instead, it preserved the original intent, reflected in the 1940 and 1920 Transportation Acts, that approval of a consolidation confers an exemption of sufficient breadth to permit implementation of the terms of the transaction.[18]

B. The Commission's interpretation of Section 11341(a) is consistent with the structure and objectives of the ICA's consolidation provisions

In addition to scrutinizing statutory language, this Court may ascertain congressional intent by "look-[ing] to the provisions of the whole law, and to its object and policy." *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975) (citation omitted). The overall structure of the ICA consolidation provisions and the purpose of Section 11341(a), as demonstrated by the legislative history, reflect two basic objectives: to

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[18] Furthermore, nothing in the plain language or legislative history suggests that laws governing labor relations are to be treated differently than other laws. Congress understood that rail consolidations and related transactions affect labor interests. It therefore instructed the Commission to consider "the interests of carrier employees affected by the proposed transaction" (49 U.S.C. 11344(b)(1)(D)) and mandated labor protective provisions to provide compensation for displaced workers (49 U.S.C. (Supp. II) 11347). But these provisions were included precisely because of the inevitable adjustments in labor conditions that accompany rail consolidations and related transactions. Indeed, the courts have long recognized the need for the Commission, as well as similar agencies, to prescribe the methods for resolving labor issues that might otherwise frustrate transactions that serve the public interest. See, *e.g.*, *Brotherhood of Locomotive Engineers* v. *Chicago & N. W. Ry.*, 314 F.2d 424 (8th Cir.), cert. denied, 375 U.S. 819 (1963); *Kent* v. *CAB*, 204 F.2d 263 (2d Cir.), cert. denied, 346 U.S. 826 (1953). See discussion at pages 37-40, *infra*.

leave the design of transactions to the carriers themselves, and to replace diverse regulation with a single public interest proceeding.

Following World War I, Congress identified rail consolidation as an important national goal. "The new policy was embodied in the Transportation Act of 1920, the provisions of which encouraged mergers and consolidations of railroad companies, under the supervision of the Interstate Commerce Commission, in the hope of bringing about a stronger national railroad economy." S. Rep. 1182, 76th Cong., 3d Sess. Pt. 1, at 1 (1940). See, *e.g.*, *Schwabacher* v. *United States*, 334 U.S. 182, 191 (1948). Senate sponsors of the 1920 legislation initially considered giving the Commission power to compel railroad mergers. See *St. Joe Paper Co.* v. *Atlantic Coast Line R.R.*, 347 U.S. at 315-316. However, Congress eventually agreed to withhold that power and, instead, created a scheme whereby the Commission would develop a national plan of consolidation in which railroads would participate voluntarily. See *ibid.*[19] That approach, however, ultimately proved unsuccessful, and it was judged better to leave the initiative to the railroads themselves. See *id.* at 316-319.

Congress therefore took further steps, through the Transportation Act of 1940, "to facilitate merger and consolidation in the national transportation system" (*County of Marin* v. *United States*, 356 U.S. 412, 416

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[19] "Although the Commission could promulgate a plan, it was given no affirmative power to put the plan into effect. It was entitled merely to insist that any consolidations submitted to it for approval should conform to the plan. Thus, the whole problem of initiating and developing actual consolidations was left in the hands of the carriers themselves." S. Rep. 1182, 76th Cong., 3d Sess. Pt. 2, at 524 (1940).

(1958) (footnote omitted)). That legislation eliminated the Commission's obligation to promulgate a national consolidation plan, leaving "the power to initiate mergers and consolidations * * * completely in the hands of the carriers." *St. Joe Paper Co.*, 347 U.S. at 319 (footnote omitted). The 1940 Act thus "relieved the Commission of its responsibility to initiate unifications." *County of Marin*, 356 U.S. at 417. " 'Instead, it authorized approval by the Commission of carrier-initiated, voluntary plans of *merger* or *consolidation* if, subject to such terms, conditions and modifications as the Commission might prescribe, the proposed transactions met with certain tests of public interest, justice, and reasonableness * * *.' " *Ibid.* (emphasis in original, quoting *Schwabacher* v. *United States*, 334 U.S. at 193). As this history shows, the statutory scheme plainly contemplates that the carriers themselves have primary responsibility for structuring the proposed transaction. "[A]lthough the Commission in fulfilling its statutory responsibilities is to carefully review all of the terms of a merger proposal and determine whether they are just and reasonable, it is not for the agency, much less the courts, to dictate the terms of the merger agreement once this standard has been met." *United States* v. *ICC*, 396 U.S. 491, 520 (1970).

This clear understanding that it is for the carriers, not the Commission, to formulate and propose transactions has an obvious corollary that is directly in point here: The Commission may approve, disapprove, or condition a transaction, but once it has approved a transaction it is not open to the Commission to make judgments about which terms were sufficiently "necessary" to override other laws. As this Court explained in *Schwabacher* (334 U.S. at 194 (emphasis added)):

> [A]pproval of a voluntary railroad merger which is within the scope of the Act is dependent upon three, and upon only three, considerations: First, a finding that it "will be consistent with the public interest." (§ 5(2)(b).) Second, a finding that, subject to any modification made by the Commission, it is "just and reasonable." (§ 5(2)(b).) Third, assent of a "majority * * * of the holders of the shares entitled to vote." (§ 5(11).) *When these conditions have been complied with, the Commission-approved transaction goes into effect without need for invoking any approval under state authority, and the parties are relieved of "restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved * * *."* (§ 5(11).)

As this Court recognized, Section 5 consciously limited the Commission's approval power to authorization of carrier-proposed transactions that met a congressionally prescribed test. But once the Commission had determined that the proposed transaction (together with any Commission-imposed conditions) satisfied that test, the ICA itself dictated the consequences.

The present provisions of the ICA state the test without substantive change, requiring a finding that the proposed transaction (as conditioned by the Commission) "is consistent with the public interest." 49 U.S.C. 11344(c). They preserve the basic statutory structure, limiting the Commission's role to approving, disapproving, or conditioning carrier-initiated proposals. And once the Commission determines, after a full hearing and careful examination of the record, that the proposal is consistent with the public interest, the Section 11341(a) exemption permits the carriers

to implement the transaction, without fear that subsequent legal challenges will block or delay execution of one part or another of a fully reviewed and approved plan.

The court of appeals' decision represents a marked departure from this statutory scheme. According to the court, the Commission's approval, based on a finding that a transaction as a whole is in the public interest, is insufficient to exempt the transaction participants from other laws that pose obstacles to implementation of the transaction. Instead, the Commission must examine each transaction term that faces a legal obstacle and determine whether exemption is "necessary to effectuate the transaction" (Pet. App. 16a n.4) and "either in the approval or in a later proceeding, must reveal evidence supporting [each such] conclusion" (*ibid.*). This approach would undermine the statutory scheme in two important respects. First, it would make the design of each transaction a function of a series of term-by-term determinations of "necessity" by the Commission, rather than a result of carrier business judgments followed by a public interest determination in which the Commission is allowed to approve, disapprove, or impose conditions on a transaction, but is not authorized to redesign it. Second, the court of appeals' decision would defeat the congressional goal of replacing a myriad of federal, state, and local legal requirements—whose effect on a transaction may not even be foreseeable when the transaction is consummated—with a single approval process in which a detailed public interest standard is applied by an expert agency that can view the transaction as a whole.

The ICA's approval process provides interested parties—including labor unions—extensive opportuni-

ties to participate in the Commission's consolidation review proceedings and to voice their objections during the "public interest" inquiry. In particular, they may object to approval of a transaction, or particular terms thereof, on the ground that it will undermine the policies expressed in other federal statutes. The Commission must take these objections into account, together with all other comments and objections, in determining whether the merger is "consistent with the public interest" (49 U.S.C. 11344(c)). See, *e.g.*, *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 79-80 (1944) (antitrust objections to motor carrier consolidation).[20] The Commission's public interest

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[20] The Commission need not, of course, give those objections controlling weight. For example, this Court has long held that the Commission must consider antitrust objections in evaluating a proposed merger, but has further noted:

> Even though such acquisitions might otherwise violate the antitrust laws, Congress has authorized the Commission to approve them if it finds they are in the public interest, "because it recognized that in some circumstances they were appropriate for effectuation of the national transportation policy. * * *."

Minneapolis & St. L. Ry. v. *United States*, 361 U.S. 173, 187 (1959). See also, *e.g.*, *United States* v. *ICC*, 396 U.S. 491, 513 (1970); *Denver & R. G. W. R.R.* v. *United States*, 387 U.S. 485, 492-493 (1967); *id.* at 515 (Harlan, J., dissenting) ("the ICC must take account of antitrust policy in judging the control questions under [former Section 5 of the ICA], but this interest is simply one of the relevant criteria, and if on balance the Commission finds a proposed undertaking to be in the public interest the statute authorizes a grant of antitrust immunity to the transaction"); *Seaboard Air Line R.R.* v. *United States*, 382 U.S. 154, 156-157 (1965); *McLean Trucking Co.*, 321 U.S. at 83 ("the policies of the anti-trust laws determine 'the public interest' in railroad regulation only in a qualified way").

determination is then subject to judicial review. But once the consolidation has been approved as consistent with the public interest, Section 11341(a)'s exemption automatically takes effect. See, *e.g.*, *Minneapolis & St. L. Ry.* v. *United States*, 361 U.S. 173, 186 (1959) (former Section 5(11) "relieves the acquiring carrier, upon approval by the Commission of the acquisition, 'from the operation of the antitrust laws * * *' ").[21]

The Section 11341(a) exemption is, of course, limited; it exempts a participant only "as necessary to let that person carry out the transaction." 49 U.S.C. 11341(a). But that language clearly grants

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[21] The Commission's responsibilities are largely the same when labor, rather than antitrust issues are involved. Just as the Commission must examine the transaction's "effect on competition among rail carriers" (49 U.S.C. 11344(b)(1)(E)), it must also consider "the interest of carrier employees affected by the proposed transaction" (49 U.S.C. 11344(b)(1)(D)). Like the antitrust inquiry, the labor inquiry reflects only one aspect of the public interest analysis. If the Commission approves the transaction based on its determination, after balancing of all the relevant factors, that the transaction serves the public interest, Section 11341(a) exempts participants from the otherwise applicable labor law. Indeed, labor interests receive additional protection in the form of statutorily mandated labor protective conditions. See 49 U.S.C. (Supp. II) 11347. These special provisions state that if the Commission's approval results in displacement of carrier employees, those employees will receive special compensation. See, *e.g.*, *Norfolk & W. Ry.* v *Nemitz*, 404 U.S. 37, 42 (1971) (the labor protective provisions are intended "not to freeze jobs but to provide compensatory conditions"). The provisions ensure that inability of the parties to agree upon changes in working conditions necessary to Commission-approved transactions will not prevent the approved transaction from being implemented. See *Missouri Pacific R.R.* v. *United Transportation Union* (85-792 Pet. Add. 28a).

an automatic exemption from any federal, state, or local law that would otherwise prevent a party from carrying out a term of an approved transaction.[22] It does not authorize the Commission to determine the intrinsic "necessity" of proposed transaction terms, much less to revisit an approved transaction to determine whether terms of a transaction approved as in the public interest are, on second thought, dispensable. The statutory scheme contemplates that objections to transaction terms must be made in the Commission's initial approval proceeding, where they are considered in connection with the overall determination of the public interest. Reliance on post-approval "necessity" proceedings would frustrate the basic purpose of encouraging "carrier-initiated, voluntary plans" (*Schwabacher*, 334 U.S. at 193) and determining in a single proceeding whether such plans, as conditioned by the Commission, are consistent with the public interest.[23]

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[22] That point, clearly expressed in the present language, was made especially plain in the previous codifications of the exemption. See 49 U.S.C. (1940 ed.) 5(11) (exemption extends "insofar as may be necessary to enable [participants] to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission"). 49 U.S.C. (1925-1926 ed.) 5(8) (exemption extends "in so far as may be necessary to enable [participants] to do anything authorized or required" by the approved transaction). As previously discussed, the present language makes no substantive change from the previous codifications (see page 27, *supra*).

[23] The Commission does, of course, have authority to entertain a post-approval petition for clarification of particular provisions of a Commission decision. See 49 C.F.R. 1117.1 (providing that the Commission may consider petitions for relief not otherwise covered by the Commission's rules).

C. The Commission's interpretation of Section 11341(a) is consistent with six decades of agency and court interpretation of the statute

The Commission first faced the issue presented here in 1923, only three years after enactment of the Transportation Act of 1920. The United States had secured an injunction under the Sherman Act ordering the Southern Pacific Company to divest itself of control over the Central Pacific Railway. *United States* v. *Southern Pacific Co.*, 259 U.S. 214 (1922). The Southern Pacific Company promptly sought Commission approval under former Section 5 of the ICA to maintain control of Central Pacific. The Commission approved the combination as consistent with the public interest notwithstanding the Sherman Act injunction. *Control of Central Pacific by Southern Pacific*, 76 I.C.C. 508, 515-517 (1923). The Commission further stated (*id.* at 517):

But the Commission's role is limited, in that instance, to clarifying the scope and terms of its prior orders. The Commission's authority to modify its prior orders approving consolidations and related transactions is limited by 49 U.S.C. 11351, which provides that the Commission may supplement its orders "[w]hen good cause exists." Good cause " 'requires some event or change in circumstances which *necessitates* a supplementation or modification * * *.' " *Illinois* v. *ICC*, 713 F.2d 305, 310 (7th Cir. 1983) (emphasis in original; quoting *Greyhound Corp.* v. *ICC*, 668 F.2d 1354, 1362 (D.C. Cir. 1981)). The Commission may also retain jurisdiction to ensure that terms and conditions of approved transactions are being followed. See, *e.g.*, *Penn-Central Merger Cases* 389 U.S. 486, 521-522 (1968). But none of these sources of post-approval review contemplate the reopening of administratively final actions for reconsideration of issues that could have been raised during the Commission's original review. See 49 U.S.C. 10327(i); 49 C.F.R. 1115.4.

> [I]t seems to us that the provisions of [former Section 5(8)] were intended by Congress to remove all active restraints by law and grant authority so far as necessary to enable the carriers affected by our order to do anything authorized or required thereby.

Thus, the Commission concluded, over 60 years ago, that once it approved a consolidation pursuant to the ICA's public interest standards, the ICA's exemption provisions automatically exempted "anything authorized or required thereby" from other legal restraints. The Commission has consistently followed that practice, stating that the exemption provisions are "self-executing" and that, accordingly, there is no need for the Commission to declare that a carrier is relieved from particular restraints. *E.g., Railway Express Agency, Inc., Notes*, 348 I.C.C. 157, 215 (1975); *Revised Regulations Governing Interlocking Officers*, 336 I.C.C. 679, 681-682 (1970); *Texas Turnpike Authority Abandonment By St. Louis Southwestern Ry.*, 328 I.C.C. 42, 46 (1965); *Chicago, St. P., M. & O. Ry. Lease*, 295 I.C.C. 696, 702 (1958).

Notably, the Commission has routinely approved—and the courts of appeals have affirmed—consolidations and operating agreements specifying labor rearrangements that, absent Commission approval and the consequent ICA exemption, could precipitate invocation of the RLA.[24] In the leading case, *Brother-*

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[24] The Commission most recently addressed this issue in *Maine Central R.R., Georgia Pacific Corp., Canadian Pacific Ltd. & Springfield Terminal Ry.—Exemption from 49 U.S.C. 11342 and 11343*, Finance Docket No. 30532 (I.C.C. Aug. 22, 1985), appeal pending, No. 85-1636 (D.C. Cir.). See 85-792 Pet. Add. 40a-51a. In that decision, the Commission noted the practical importance of resolving labor disputes through the

hood of Locomotive Engineers v. *Chicago & N. W. Ry.*, 314 F.2d 24 (8th Cir.), cert. denied, 375 U.S. 819 (1963), the Commission approved a rail carrier's acquisition of another railroad pursuant to former Section 5(2) of the ICA, subject to a stipulation by the railroads and the affected unions providing labor protective provisions. The stipulation specifically provided that disputes would be resolved through binding arbitration. 314 F.2d at 427. When disputes later arose, the unions refused to go to arbitration, claiming instead that, despite the stipulation, they were entitled to invoke their RLA rights. The court of appeals rejected the union's arguments.

The court recognized that "[the Commission's] power to authorize mergers would be completely ineffective if authority to adjust work realignments through fair compensation did not exist." 314 F.2d at 430. It concluded that "Congress intended the [Commission] to have jurisdiction to prescribe the method for determining the solution of labor problems arising directly out of approved mergers" (*id.* at 431). The court stated (*id.* at 431-432):

Commission's labor protective provisions rather than the RLA procedures, stating (85-792 Pet. Add. 50a):

> All of our labor protective conditions provide for compulsory binding arbitration to arrive at implementing agreements if the parties are unable to do so, so that approved transactions can ultimately be consummated. Under RLA, however, changes in working conditions are generally classified as major disputes with the results that there is no requirement of binding arbitration. * * *. Since there is no mechanism for insuring that the parties will arrive at agreement, there can be no assurance that the approved transaction will ever be effected.

> Thus, like the trial court, we come to the conclusion that to hold otherwise would be to disregard the plain language of [former Section 5(11)] conferring exclusive and plenary jurisdiction upon the [Commission] to approve mergers and relieving the carrier from all other restraints of federal law.

The court specifically rejected the union's argument that the Commission must make express findings relieving the carriers from their RLA obligations (314 F.2d at 432). The court quoted with approval from the Commission opinion in *Chicago, St. P., M. & O. Ry. Lease*, 295 I.C.C. 696, 702 (1958), stating (314 F.2d at 432):

> The terms of [the ICA exemption provisions] are self-executing, and there is no need for this Commission expressly to order or declare that a carrier be relieved from certain restraints. It is sufficient if we make clear what the carrier is authorized to do.

Other decisions have reached similar results, agreeing that the Commission may approve rail consolidations that specify particular labor arrangements and, as a consequence, curtail RLA rights. See, *e.g.*, *Missouri Pacific R.R.* v. *United Transportation Union*, 782 F.2d 107 (8th Cir. 1986), petition for cert. pending, No. 85-1054; *Nemitz* v. *Norfolk & W. Ry.*, 436 F.2d 841, 845 (6th Cir.), aff'd on other grounds, 404 U.S. 37 (1971). Furthermore, that authority is implicit in decisions of this Court and the courts of appeals recognizing the Commission's authority to impose labor protective conditions. See, *e.g.*, *Norfolk & W. Ry.* v. *Nemitz*, 404 U.S. 37 (1971); *Brotherhood of Maintenance of Way Employees* v. *United States*, 366

U.S. 169 (1961); *Railway Labor Executives' Ass'n* v. *United States*, 339 U.S. 142 (1950); *Railway Labor Executives' Ass'n* v. *ICC*, 675 F.2d 1248 (D.C. Cir. 1982); *New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979).[25] The cases relied upon by the court of appeals, by contrast, are largely inap-

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[25] This Court has noted, in particular, that the purpose of the ICA's labor protective provisions requirement "was not to freeze jobs but to provide compensatory conditions." *Norfolk & W. Ry.*, 404 U.S. at 42; accord, *Brotherhood of Maintenance of Way Employees* v. *United States*, 366 U.S. at 175-176. That purpose is made clear by the legislative history of the labor protective provisions and, in particular, by Congress's rejection of the "Harrington Amendment" to the Transportation Act of 1940, which would have imposed a job freeze upon merging railroads. See *Brotherhood of Maintenance of Way Employees*, 366 U.S. at 173-176. As the Eighth Circuit explained, the rejection of the Harrington Amendment also indicates that Congress empowered the Commission to prescribe alternatives to the RLA for determining the solution of labor disputes arising out of approved transactions. *Chicago & N. W. Ry.*, 314 F.2d at 430-431.

Indeed, the Commission would presumably have authority to approve consolidation plans that override RLA rights even in the absence of Section 11341(a)'s express exemption. For example, the courts long recognized the Civil Aeronautics Board's authority to adjust the seniority rights of employees affected by the merger of two airlines even in the absence of explicit statutory authority to do so. See, *e.g.*, *Kent* v. *CAB*, 204 F.2d 263, 265-266 (2d Cir.), cert. denied, 346 U.S. 826 (1953). Thus, even a " 'private contract must yield to the paramount power of the Board to perform its duties under the statute creating it to approve mergers * * * only upon such terms as it determines to be just and reasonable in the public interest.' " *American Airlines, Inc.* v. *CAB*, 445 F.2d 891, 896 (2d Cir. 1971), cert. denied, 404 U.S. 1015 (1972) (quoting *Kent*, 204 F.2d at 266).

posite, as discussed by Judge MacKinnon at some length in his dissent (Pet. App. 33a-38a).[26]

In sum, the court below has failed to give proper deference to an expert agency's longstanding inter-

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[26] In particular, the court mistakenly cited *City of Palestine* v. *United States*, 559 F.2d 408 (5th Cir. 1977), cert. denied, 435 U.S. 950 (1978), and *Texas & N. O. R.R.* v. *Brotherhood of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962), cert. denied, 371 U.S. 952 (1963), for the proposition that the Commission must explain the necessity for a Section 11341(a) exemption (Pet. App. 17a-18a). *City of Palestine* held, upon direct review of a Commission consolidation approval decision, that the Commission exceeded the scope of its approval authority by voiding a contract that was "not germane" to the transaction. 559 F.2d at 414. Here, by contrast, there is no dispute that the Commission properly granted MKT and DRGW trackage rights to ameliorate certain anticompetitive effects of the UP-MP consolidation. See *UP-Control-MP*, 366 I.C.C. at 566-579. There can be no serious dispute that the tenant railroads' reservations of the right to use their own crews are "material terms" (Pet. App. 67a) of those trackage rights. As Judge MacKinnon explained, "the Commission's goal of preservation of competition through the grant of trackage rights might well be frustrated by the prospect of requiring the railroads granted those rights to negotiate with the union representing the employees of [their] *competitors*" (*id.* at 39a (emphasis in original)). *Texas & N. O. R.R.* held that the ICA's exemption provision does not confer jurisdiction on the courts, otherwise withdrawn by the Norris-LaGuardia Act, to enjoin labor disputes. 307 F.2d at 156. The court specifically noted that "[i]f it should be determined that the Commission's authority under [former] section 5 is being frustrated by application of [the] Norris-LaGuardia [Act] to the present suit, we would have to conclude that Norris-LaGuardia was preempted by [former] section 5(11), even though [former] section 5 is not labor legislation." 307 F.2d at 158. To the extent that *City of Palestine* and *Texas & N. O. R.R.* contain dicta contrary to the Commission's interpretation of the ICA's exemption provision, we consider those dicta incorrect.

pretation of the statute that it is entrusted to administer. See, *e.g.*, *United States* v. *Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985), slip op. 9; *Chevron U.S.A. Inc.*, 467 U.S. at 842-843. The court's departure from established principles of judicial deference is particularly inappropriate here, where the Commission's interpretation has received both explicit and implicit judicial approval.

D. The court of appeals' construction would seriously impede the implementation of Commission-approved transactions

The court of appeals' decision not only runs counter to the language, structure, and longstanding interpretation of the statute; it also would pose serious practical obstacles to Commission review of proposed consolidations and trackage rights transactions. The court states that the Commission "either in the approval or in a later proceeding, must reveal evidence supporting a conclusion that waiver of a particular legal obstacle is necessary to effectuate the transaction" (Pet. App. 16a n.4). But the Commission plainly cannot anticipate and reconcile all potential legal obstacles during the approval process.[27] The Commission must rely on interested parties to bring their specific concerns to its attention. And the court's suggestion that the Commission later reevaluate approved transactions to determine whether a Section 11341(a) exemption is truly necessary will result in post-approval confusion, litigation, and consequent delays. Carriers that have received approval of their

[27] Indeed, the court of appeals itself recognized (Pet. App. 16a n.4) that requiring the Commission to enumerate every legal obstacle would undermine the ICA's purpose of facilitating rail consolidations.

consolidation plans will face continuing legal challenges, thwarting implementation of transactions that have been reviewed and found consistent with the public interest.

The court of appeals' approach would also introduce an element of gamesmanship to the approval process. Under the Commission's interpretation, proponents of a transaction have a strong incentive to explain fully the terms of their proposal because the scope of their Section 11341(a) exemption extends only so far as the terms they specify. See *Chicago, St. P., M. & O. Ry. Lease*, 295 I.C.C. 696 (1958). And persons who believe that the transaction will interfere with their existing rights have a strong incentive to present timely "public interest" objections for the Commission's review. The court of appeals' decision provides, however, that an exemption may be denied if approved terms of the transaction are later determined not to be "necessary" to the transaction. The court's decision may therefore encourage parties who oppose a particular transaction to reserve their objections, based on strategic considerations, for post-approval challenge. The Commission, in turn, would be denied full input from the parties at the crucial transaction approval stage of its proceedings.

These problems are well illustrated in the present case. The Commission conducted an extensive review of Union Pacific Corporation's UP-MP-WP consolidation proposal, which involved over 22,000 miles of railroad tracks located in the western and midwestern states. Numerous parties participated, including 10 Class I railroads, 12 labor organizations, various federal and state governmental agencies and interested corporations and individuals. See *UP-Control-MP*, 366 I.C.C. at 474-482. The Commission held

hearings spanning 11 months and received testimony from over 300 witnesses. It compiled an administrative record that included over 600 hearing exhibits and over 18,000 pages of transcript. The Commission then issued a comprehensive 196-page opinion, accompanied by 12 appendices, approving the consolidation subject to various conditions, and its decision was affirmed in all relevant respects by the court of appeals.

In the course of these proceedings, MKT and DRGW filed trackage rights applications placing all participants, including BLE and UTU, on notice of their intention to conduct operations using their own crews. As previously noted, both MKT and DRGW specified within their trackage rights applications that they would retain the right to use their own crews (see note 5, *supra*). They both made clear, in subsequent written statements supporting their trackage rights and in hearing testimony, that they would crew their own trains (Pet. App. 62a-63a). And their projections of labor impacts were based on assumptions that they would use their own crews (*ibid.*).

Neither BLE nor UTU objected to MKT's and DRGW's crewing provisions at any point in the Commission proceeding (Pet. App. 62a-64a). Nor did they suggest that they have the established rights to participate in crewing decisions that they now claim. Indeed, the BLE's witness, Mr. Becker, indicated that, if the trackage rights were granted, BLE employees would be adversely affected (Pet. App. 64a-65a). And the UTU, in its post-hearing brief, relied on labor impact evidence that assumed trackage rights operations would be conducted by the tenant railroads' crews (Pet. App. 65a). Neither

BLE nor UTU objected to the crewing provisions in the subsequent judicial review of the Commission's decision. The unions did not present their objection to the crewing terms until April 4, 1983, over five months after the Commission had approved the transaction (see Pet. App. 51a).

The mechanism contemplated by Congress will only work if carriers fully describe their proposed transactions and opposing parties fully present their objections in the statutory public approval proceedings. MKT and DRGW fulfilled their obligations by seeking Commission approval of their proposed transaction terms. BLE and UTU could have objected to the MKT/DRGW crewing provisions in the original Commission proceeding. The Commission would have resolved the union claims under its "public interest" standard, taking into account "the interest of carrier employees affected by the proposed transaction." 49 U.S.C. 11344(b)(1)(D). In the absence of any objection,[28] the Commission was fully justified in approving the proposed terms. Yet under the court of appeals' decision, the unions would be permitted to raise their claims months later in a post-approval proceeding, in which the Commission would be required to evaluate the objection under a different standard: whether "termination of the asserted rights to participate in crew selection is necessary to

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[28] Contrary to the court of appeals' suggestion (Pet. App. 16a), the Commission cannot be expected to anticipate objections that the affected parties themselves fail to raise. Indeed, the union's post-approval objections in this case were unforeseeable. Judge MacKinnon's comment was that the unions' purported rights are based on the "astonishing contention" that "the unions, in effect, have a proprietary interest in the tracks of their employer" (*id.* at 29a).

effectuate the pro-competitive purpose of the grant of trackage rights" (Pet. App. 45a).

The unions' post-approval legal challenges have already created substantial and lingering uncertainty concerning the terms of UP-MP-WP consolidation, a merger initiated nearly six years ago. If the Commission is required to reevaluate the "necessity" of approved transaction terms, subject, inevitably, to further judicial review, additional delays and uncertainty will result.[29] Plainly, the court of appeals' decision opens the door to litigation that will ultimately discourage rail consolidation, impede effectuation of our Nation's rail transportation policy, and prevent the issuance of "fair and expeditious regulatory decisions when regulation is required." 49 U.S.C. 10101a(2).

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[29] Furthermore, if the parties are ultimately required to resort to the RLA to effect changes in working conditions, either labor or management could delay indefinitely or thwart entirely the implementation of a Commission-approved transaction by refusing to agree to changes in working conditions. As we have previously noted, the Commission's plenary power to approve transactions that will result in labor rearrangements is implicitly recognized in *Norfolk & W. Ry.* v. *Nemitz*, 404 U.S. at 42-43, and is expressly articulated in *Chicago & N. W. Ry.*, 314 F.2d at 430, and *Missouri Pacific R.R.* (85-792 Pet. Add. 28a). See pages 37-40, *supra*. Indeed, the courts have concluded that regulatory agencies have the authority to resolve labor problems as necessary to ensure that approved transactions can be implemented even in the absence of an explicit statutory provision such as Section 11341(a). See note 25, *supra*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Nos. 85-792, 85-793

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

INTERSTATE COMMERCE COMMISSION and
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
Petitioners,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS and
UNITED TRANSPORTATION UNION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF RESPONDENTS UNION PACIFIC RAILROAD COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY SUPPORTING PETITIONERS

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BRIEF OF RESPONDENTS UNION PACIFIC RAILROAD COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY SUPPORTING PETITIONERS

Respondents Union Pacific Railroad Company and Missouri Pacific Railroad Company, intervenors in the court below, submit this brief in support of petitioners' request for reversal of the decision below of the United States Court of Appeals for the District of Columbia Circuit.

STATEMENT

Respondents Union Pacific and Missouri Pacific anticipate that the petitioners' briefs will accurately set forth the chronology of events leading to this proceeding. Accordingly, pursuant to Rule 34.2, respondents' statement will be limited to some additional elaboration necessary to put that chronology in context.

The proceedings below arise from disputes within several labor unions concerning which local's members would operate the trains of petitioner Missouri-Kansas-Texas Railroad Company ("Katy") in trackage rights service over the lines of respondent Missouri Pacific Railroad Company.[1] Respondent UTU, claiming rights purportedly based on the Railway Labor Act, complained to the ICC that its members employed by MP—rather than its members employed by the Katy—should operate Katy trains over MP's lines between Kansas City and Omaha. As the landlord carrier in these arrangements, MP was thus placed in the middle of a controversy over the selection of crews to operate its competitor's trains, a circumstance that was later aggravated by the unions' threat to strike MP over Katy's decision to operate its trains with Katy crews. See *generally Missouri Pacific Railroad Co.* v. *United Transportation Union*, 580 F. Supp. 1490 (E.D. Mo. 1984) (enjoining threatened strike), *aff'd*, 782 F.2d 107 (8th Cir. 1986) (*per curiam*), *pet. for cert. pending*, No. 85-1054.

The ICC rejected the unions' challenges. The Commission confirmed that Katy's trackage rights application, which it had approved, reflected Katy's plans to use its own crews to operate its trains. Pet. App. 62a.[2] The Commission recognized that its approval "exempts such a transaction from the requirements of all laws as necessary to permit the transaction to be carried out, and includes an exemption from the requirements of the RLA." See Pet. App. 67a. Accordingly, the ICC held that,

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[1] Trackage rights allow one railroad to move its trains over another railroad's tracks. Such arrangements are common in the railroad industry, and often encouraged to avoid unnecessary duplication of track by railroads serving the same locations. Using the same set of tracks, the landlord and tenant carriers traditionally maintain separate—and often competing—operations with their own employees. Here, for example, the ICC imposed a condition to the UP/MP consolidation requiring UP/MP to grant the Katy the right to operate trains over MP's lines between Omaha and Kansas City. The ICC found that such trackage rights were needed to offset perceived competitive effects of the consolidation. See Union Pacific Railroad Company—Control—Missouri Pacific Railroad Company, 366 I.C.C. 459, 566 *et seq.* (1982), *aff'd in relevant part*, Southern Pacific Transp. Co. v. ICC, 736 F.2d 708 (D.C. Cir. 1984) (per curiam), *cert. denied*, 105 S. Ct. 1172 (1985).

[2] Record references are to the Appendix to the Interstate Commerce Commission's Petition For A Writ of Certiorari, filed in No. 85-792.

notwithstanding any contrary provisions of the Railway Labor Act, Katy was authorized to select the crews to operate its trains in trackage rights service. Pet. App. 67a-68a.

In an opinion by Judge Wright, joined by Judge Mikva, the D.C. Circuit Court of Appeals reversed and remanded on the asserted ground that the ICC "did not give a shred of reasoning to support its view that completion of the transactions required shielding crew selection from the Railway Labor Act." (Pet. App. 19a; footnote omitted.) Accordingly, judgment was entered for the unions over a vigorous dissent by Judge MacKinnon. In a subsequent decision of the Eighth Circuit Court of Appeals addressing the same dispute, that court declined to follow the D.C. Circuit Court's holding. See *Missouri Pacific, supra,* 782 F.2d at 110 *et seq.*

SUMMARY OF ARGUMENT

The immunity afforded by the Interstate Commerce Act must be self-executing, and must apply not only to consummation of the approved transaction, but also to its implementation. Specific findings of "necessity" are not required by the statute or by its legislative history. Judicial imposition of such a requirement would be inconsistent with the national transportation policy recently affirmed by Congress, and would put at risk the public interest benefits of transactions approved by the ICC.

ARGUMENT

THE IMMUNITY AFFORDED BY THE ICC'S APPROVAL OF RAIL RESTRUCTURING TRANSACTIONS IS "SELF-EXECUTING" AND NEED NOT BE JUSTIFIED BY SPECIFIC FINDINGS

We are confident that petitioners' briefs will demonstrate (1) that the Commission adequately explained the reasoning for its decision and (2) that the immunity afforded by the Interstate Commerce Act is, in fact, necessary for implementation of the approved Katy trackage rights transaction.

We submit, however, that this Court need not and should not reach those issues. The statutory scheme—and common sense—require that the immunity afforded by the Interstate Commerce Act be "self-executing," in the sense that specific findings of "necessity" by the ICC—to which no reference is made in the statute or in the legislative history—are neither required nor prudent. Once the ICC approves a rail restructuring under the Interstate Commerce Act, the statute should immediately afford immunity to all actions taken to implement the approved transaction.[3] For that reason, the Commission's decision below (though unnecessary) was correct, and the contrary holding of the D.C. Circuit Court should be reversed.[4]

The leading case on this issue is *Kent* v. *Civil Aeronautics Board,* 204 F.2d 263 (2d Cir. 1953), in which the Second Circuit held the Railway Labor Act inapplicable to mergers approved by the CAB under the terms of the Civil Aeronautics Act.[5] *Kent* did not require specific agency findings of "necessity" to justify the immunity; it simply recognized that the agency had given "due consideration" to the conflicting interests of both groups of employees, and "provided a method which fairly distributes the burdens and benefits." 204 F.2d at

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[3] The relevant history of the Interstate Commerce Act and of its relationship with the Railway Labor Act is explained in Part II of the Brief Amicus Curiae of the Association of American Railroads, to which we invite the Court's attention.

[4] The court below would limit the immunity afforded by the Act to the formal consummation of the approved transaction; in its view, the immunity was intended only "to allow transactions to occur." Pet. App. 16a. That narrow perspective is inconsistent both with the transportation policies of the Act and with the objectives of the immunity power itself. If either set of objectives is to be accomplished, the immunity must be broad enough to embrace implementation of the approved transaction, as well as its formal consummation.

[5] The Civil Aeronautics Act was similar in all relevant respects to the Interstate Commerce Act, and it included an express exemption provision like that in the Interstate Commerce Act. *Compare* 49 U.S.C. § 11341(a) (1982) with 49 U.S.C. § 494 (1952). The *Kent* court nevertheless recognized that implied immunity was necessary for realization of the public interest benefits of the approved transaction, including the "stability in air transportation that freedom from industrial strife will provide." 204 F.2d at 265. In light of the ICC's comparable implied immunity powers, this Court need not rely on the express exemption provision of Section 11341 in reversing the Court below.

266. The ICC did precisely that here; in its decision approving the Katy's trackage rights, it provided traditional labor protections, including mandatory arbitration, for employees adversely affected by the approved transaction. See *Union Pacific—Control—Missouri Pacific, supra,* 366 I.C.C. at 654.[6]

Since *Kent,* almost without exception the federal courts have held that the Interstate Commerce Commission approval of a rail restructuring affords the participants immunity from any conflicting terms of the Railway Labor Act; in none of those cases was a specific finding of "necessity" required from the agency. For example, in *Brotherhood of Locomotive Engineers* v. *Chicago & North Western Ry. Co.,* 314 F.2d 424, 432 (8th Cir.), *cert. denied,* 375 U.S. 819 (1963), the Eighth Circuit Court held that the provisions of the Railway Labor Act were displaced even though "the Commission made no express finding or order" addressing the immunity issue.

In similar circumstances, the First Circuit Court recently reached the same result, recognizing that the exemption afforded by the Interstate Commerce Act is "self-executing." *Brotherhood of Locomotive Engineers* v. *Boston & Maine Corp.,* 122 L.R.R.M. 2020 (1st Cir. April 9, 1986); *Nemitz* v. *Norfolk & Western Ry.,* 436 F.2d 841, 844-46 (6th Cir.), *aff'd on other grounds,* 404 U.S. 37 (1971). *Accord, Missouri Pacific Railroad, supra,* 782 F.2d at 111-12. All of these cases are consistent with this Court's decision in *Schwabacher* v. *United States,* 334 U.S. 182, 194 (1948), which held that the only

[6] The mandatory arbitration provisions are particularly important because they ensure that labor disputes arising out of approved rail transactions cannot block the public interest benefits of such transactions or otherwise interrupt the free flow of commerce. In this respect, they are fundamentally different from the Railway Labor Act protections, which in some circumstances allow the unions to strike. Other elements of the protective conditions include generous compensatory benefits ensuring that employees dismissed or displaced as a consequence of the approved transaction continue to receive their wages for as long as six years after the transaction. These conditions have been held to satisfy the requirement of 49 U.S.C. § 11347 that carriers involved in consolidation transactions provide fair arrangements to protect the interests of their employees. *E.g.,* RLEA v. United States, 675 F.2d 1248 (D.C. Cir. 1982).

findings necessary to trigger the statutory immunity were those confirming that the approved transaction was in the public interest.[7]

The authorities cited above reach the only result consistent with common sense. The ICC could not reasonably be expected to anticipate every conceivable statutory obstacle to implementation of an approved rail restructuring. Nor could it reasonably be expected to articulate in advance the full panoply of "necessity" findings that would ensure realization of the public interest benefits of the approved transaction. Moreover, a requirement of specific, anticipatory findings would be vulnerable to exploitation by interested parties, who could refrain—as the unions did here—from bringing potential statutory conflicts to the Commission's attention during its review of the restructuring transaction.

We recognize, as did the court below, that there must be some means "to ensure that the ICC does not exceed its statutory powers." Pet. App. 17a. But, as confirmed by the unions' threat to strike over this dispute, forcing the Commission to speculate about every potential statutory conflict is not the answer to that concern. Instead, the Commission's compliance with the Act may be ensured by limiting the implied immunity power to consummation of the restructuring transaction (*e.g.*, the consolidation) and to its implementation.[8] Such

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[7] City of Palestine v. United States, 559 F.2d 408 (5th Cir. 1977), *cert. denied*, 435 U.S. 950 (1978), on which the majority below relies, is not to the contrary. That case involved a railroad's attempt to abrogate in a merger proceeding a contract in which one of the merging carriers had promised "to forever maintain in Palestine 4.5% of all of its employees in certain job classifications." 559 F.2d at 412. Because that contract was "not germane to the success of" the approved merger, the Fifth Circuit held that its abrogation was not immunized by the Interstate Commerce Act. *Id.* at 414. Unlike this dispute, which unquestionably involves labor impacts resulting from implementation of an approved transaction, *City of Palestine* did not address an effort by the merged carrier to implement the approved restructuring transaction.

[8] ICC orders in this proceeding confirm that any limitation on a tenant's rights to assign its own crews could, by reducing the tenant's control over service and variable costs, undermine the competitive effectiveness of the trackage rights. See, *e.g.*, F.D. 30000, Order of November 24, 1982, at 3; Order of January 18, 1983, at 3. Thus, crew selection is unquestionably related to the trackage rights transaction, and an inherent part of its

(footnote continues)

a limitation would offer the lower courts guidance when, as in this dispute, a question is raised in a collateral proceeding as to whether immunity has been afforded by a Commission decision. Such an approach would also take full advantage of the Commission's expertise, while limiting its discretion to those areas within the scope of its statutory mandate.

The alternatives to such an approach—delaying or putting at risk the public interest benefits of an approved transaction pending *post hoc* agency proceedings—are surely inconsistent with the national transportation policy recently affirmed by Congress. See *generally* 49 U.S.C. § 10101; S. Rep. 94-499, at 2-3, 1976 U.S. Code & Ad. News at 16 (complaining of administrative merger proceedings that previously had "drastically slowed change needed in the [rail] industry").

In this dispute, the good sense of the federal district court in St. Louis and the Eighth Circuit Court of Appeals prevented such a result; both courts recognized that denying Katy and MP immunity because of the absence of specific anticipatory findings "would be tantamount to saying that [a union] has carte blanche authority to frustrate and avoid a material term of a consolidation approved by the ICC. Congress did not intend that affected employees have such power to block consolidations which are in the public interest." *Missouri Pacific Railroad Co., supra,* 782 F.2d 111-12, *affirming Missouri Pacific Railroad Co., supra,* 580 F. Supp. at 1505. If this Court affirms the decision below, there is no assurance that such wisdom will prevail in the next dispute over implementation of a rail restructuring that the ICC has deemed in the public interest.

(footnote continued)

implementation. In contrast, for example, the issue addressed in *City of Palestine, supra,* which involved a railroad's long-term commitment to maintain a small part of its work force in one city, had no demonstrable transaction-related impact.

CONCLUSION

This Court should reverse and remand the court of appeals' decision, with instructions to affirm the underlying decisions of the Interstate Commerce Commission. This Court should confirm that the immunity afforded all rail restructuring transactions by the Interstate Commerce Act is "self-executing," that such immunity does not require specific findings of "necessity" by the ICC, and that such immunity applies not only to consummation of the transaction itself, but also to its implementation.

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Nos. 85-792 and 85-793

In the Supreme Court of the United States

October Term, 1985

INTERSTATE COMMERCE COMMISSION,
Petitioner,

vs.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *et al.*,
Respondents.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
Petitioner,

vs.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT BROTHERHOOD OF LOCOMOTIVE ENGINEERS

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QUESTIONS PRESENTED

1. Do the provisions of 49 U.S.C. § 11341(a) preclude railroads participating in a trackage rights transaction from abiding by the requirements of the Railway Labor Act, 45 U.S.C. §§ 151-160, and their contractual obligations to their employees?

2. Whether any immunization from the Railway Labor Act and employee contractual obligations provided a rail carrier by 49 U.S.C. § 11341(a) must be supported by findings of necessity by the Interstate Commerce Commission, which findings specify the extent such immunization is necesssary to carry out the transaction?

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STATEMENT

This case involves a trackage rights transaction "approved by or exempted by the [Interstate Commerce Commission]" under provisions of the Interstate Commerce Act, 49 U.S.C. §§ 11341-11351, and calls upon the Court to decide whether the immunity provisions of 49 U.S.C. § 11341(a), which provide that a "person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction," relieve the involved rail carriers from the Railway Labor Act and contractual obligations to their employees. If 49 U.S.C. § 11341(a) does exempt the participating carriers from those obligations, the question arises whether the Interstate Commerce Commission must make findings of necessity and must specify the extent to which the exemption is necessary to carry out the transaction.

Respondent Brotherhood of Locomotive Engineers ("BLE") is a railway labor organization, national in scope and organized in accordance with the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151-160. BLE is the representative for the craft of locomotive engineers on almost all of the nation's railroads, including the rail carriers in this proceeding, Union Pacific Railroad Company ("UP"), Missouri Pacific Railroad Company ("MP"), Missouri-Kansas-Texas Railroad Company ("MKT") and Denver & Rio Grande Western Railroad Company ("DRGW").

The BLE is not a monolithic institution, for the locomotive engineers on each railroad are represented by a separate general committee of adjustment, which negotiates the working or so-called schedule agreements concerning

rules, rates of pay, and working conditions in effect on that carrier, and those agreements cover matters such as seniority and rights to runs. *See, e.g., General Committee v. Missouri-Kansas-Texas R.R.*, 320 U.S. 323, 325 (1943).[1] Railroad working agreements are extensive and also are "intricate and technical," and require a perusal of "usage, practice and custom" to properly understand them. See *Order of Railway Conductors v. Pitney*, 326 U.S. 561, 567 (1946). In the past several decades, however, national bargaining has taken place between the International BLE and the National Railway Labor Conference, as the representative for most of the nation's Class I railroads in national handling of certain issues, so that the rates of pay for engineers on MP, MKT and DRGW are similar.

A. Historical Background

As petitioners perceive, a review of the historical background of section 11341(a) is necessary to resolve this case. However, petitioners' summary of that history is restrictive and, in limiting itself to the congressional policy to eliminate redundant rail facilities through consolidations, serves to distort the congressional intent regarding application of the RLA and continuation of collective bargaining rights. Moreover, unless one looks at the employee protections accompanying that history, the dilemma confronting the respondent unions in 1982 and 1983 is not disclosed.

Although section 11341(a) had its origin in the Transportation Act of 1920, Pub. L. No. 66-152, ch. 91, § 407(8), 41 Stat. 456, 482 (1920), the first provision for the protection of railroad employees appears in the Emergency Rail-

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1. Standing Rule 33(a) of BLE's Constitution states: "The General Committee of Adjustment shall have full power to settle all questions of seniority and rights to runs and jurisdiction of territory that are presented to it. . . ."

road Transportation Act of 1933 ("ERTA"), Pub. L. No. 68, ch. 91, Sections 1-17 and 209, 48 Stat. 211-217 and 221 (1933). The ERTA, among other things, provided for the appointment of a Federal Coordinator of Transportation who was given the duty of preventing unnecessary duplication of services and facilities. Containing the first recognition by Congress of the principle of employee protection against the adverse effects of mergers, Section 7(b) of ERTA provided, in part, a formula below which employment levels could not fall in a given year and that no "employee be deprived of employment such as he had during said month of May [1933] or be in a worse position with respect to his compensation for such employment, by reason of any action taken pursuant to the authority conferred by this title." (48 Stat. 214).[2]

The ERTA also provided for various studies to promote the purposes of the Act. In his 1934 Report to Congress, the Coordinator, Commissioner Joseph B. Eastman, examined the issue of which employees should be retained as a result of reductions in labor requirements by consolidations. H. R. Doc. 89, 74th Cong., 1st Sess. (Jan. 30, 1935). Commissioner Eastman noted these adjustments were difficult and often were "accompanied by much bitterness and disappointment, which in turn . . . seriously affected the morale of the employees concerned and the service rendered by them." *Id.*, 89. He also suggested

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2. Section 7(d) directed the Federal Coordinator to require the railroads to compensate employees for financial losses caused by reason of moving to follow their work when transferred under authority of the statute:

> The Coordinator is authorized and directed to provide means for determining the amount of, and to require the carriers to make just compensation for, property losses and expenses imposed upon employees by reason of transfers of work from one locality to another in carrying out the purposes of this title.

that a simple formula of employee selection based on seniority be legislated. This proposal was never acted upon, for as one commentator has stated, "Any necessity for such action was averted by the national railroad labor organizations, which demonstrated adequate capacity to intervene effectively in these seniority disputes." Kahn, *Seniority Problems in Business Mergers*, 8 INDUSTRIAL AND LABOR RELATIONS REVIEW 361, 366 (1954).

The various unions adopted constitutional provisions that list the considerations to be observed in allocating the work and the procedures to be followed selecting the employees to perform that work. *Id.* Generally, these constitutional principles grant the employees involved in transfers, consolidations, coordinations, abandonments, and other railroad financial transactions the right to follow their positions or work with their seniority rights. *Id.*, 371-372.[3]

The effective period of the ERTA was extended by proclamation of President Roosevelt to June 17, 1936, at which date it expired. On May 21, 1936, at the request of the railroad labor organizations and as the result of substantial government pressure, an agreement was signed by the unions and most of the nation's carriers, which is commonly referred to as the "Washington Job Protection Agreement ("WJPA" or "Washington Agreement"). *Id.*

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3. BLE's Constitution contains comprehensive provisions concerning questions as to seniority and rights to runs arising from mergers, consolidations, coordinations, controls, absorptions, diversions of traffic, purchases or any other action whereby separate facilities or operations of railroads are going to be unified. BLE Constitution, Standing Rules 34-37 (1981). In general, the organic law specifies that "the engineers on the road, or roads, or any portion thereof, affected thereby, shall retain their right and seniority, as heretofore, on the roads absorbed, traffic diverted, consolidated, merged, leased or coordinated; but the runs shall be manned by the engineers of the respective roads in proportion, as near as practicable to the car miles or train miles in road service and to the engine hours or inbound car count in yard service, in the territory involved on each road."

This document, which is still in effect, provides for certain monetary allowances for dismissals and displacements resulting from "coordinations." See appendix in *St. Joe Paper Co. v. Atlantic Coast Line R.R.*, 347 U.S. 298, 315 (1954) for text of WJPA. Section 2(a) defines "coordination" as "joint action by two or more carriers whereby they unify, consolidate, merge or pool in whole or in part their separate railroad facilities or any of the operations or services previously performed by them through such separate facilities." Section 4 of the WJPA requires "each carrier contemplating a coordination to give at least ninety (90) days written notice of such intended coordination," and section 5 provides "for the selection of forces from the employees of all carriers involved" and their assignment necessitated by the coordination "on the basis of an agreement between the carriers and the organizations of the employees affected, parties hereto."[4]

In sum, the WJPA provides some measure of financial protection to employees adversely affected by displacements or dismissals as a result of a "coordination" and through the notice and negotiation provisions a means of protecting the affected employees in their seniority rights and places and types of work.

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4. Until this case, the Interstate Commerce Commission had concluded that the WJPA was the foundation for the Commission formulated employee protections and that its provisions had been embodied therein:

> Beyond doubt, the Washington Agreement was the foundation upon which all employee protective plans have been constructed. It was the basis for the legislation from which evolved section 5(2)(f). And in framing the conditions to be imposed in this proceeding, we relied upon our holding in the *New Orleans Case* that imposition of the provisions of the Washington Agreement, subject to limitations discussed therein, would provide the fair and equitable arrangement commanded by the statute.

Southern Ry. - Control - Central of Georgia Ry., 331 I.C.C. 151, 164 (1967).

Although Title I of the ERTA expired, the merger provisions of the Transportation Act of 1920 continued in effect. Section 5(4) of the Interstate Commerce Act, which was added by the 1920 Act, Pub. L. No. 66-152, ch. 91, 407(4), 41 Stat. 456, 481, and amended by the ERTA, provided that the ICC could authorize consolidations "upon the terms and conditions and with the modifications so found to be just and reasonable." In *United States v. Lowden*, 308 U.S. 225, 234 (1939), this Court affirmed the Commission's power to impose employee protections as "just and reasonable" conditions in the public interest, and said:

> One must disregard the entire history of railroad labor relations in the United States to be able to say that the just and reasonable treatment of railroad employees in mitigation of the hardship imposed on them in carrying out the national policy of railway consolidation, has no bearing on the successful prosecution of that policy and no relationship to the maintenance of an adequate and efficient transportation system.

While the Transportation Act of 1940, Pub. L. No. 785, ch. 722, 54 Stat. 899 (1940), liberalized the consolidation and merger provisions of the Interstate Commerce Act, Congress, which was thoroughly aware of the effects on railroad employees, added section 5(2)(f) and for the first time specifically required the protection of railroad employees affected by transactions, *i.e.*, mergers, consolidations, acquisitions of control, leases, and acquisitions of trackage rights.[5]

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5. Section 5(2)(f) [which, as amended, is now 49 U.S.C. § 11347] provides:

> As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad

(Continued on following page)

Subsequently, the Commission held that it could not impose employee protective conditions in abandonment proceedings. This Court, however, affirmed the decision of the district court that the Commission had this power in the "public convenience and necessity", which concept was as broad as the "public interest" phrase used in the Transportation Act of 1920, and stated in regard to labor protection:

> [I]f national interests are to be considered in connection with an abandonment, there is nothing in the Act to indicate that the national interest in purely financial stability is to be determinative while the national interest in the stability of the labor supply available to the railroads is to be disregarded. On the contrary, the *Lowden* case recognizes that the unstabilizing effects of displacing labor without protection might be prejudicial to the orderly and efficient operation of the national railroad system.

Footnote continued—

> subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

The Transportation Act of 1940, Pub. L. No. 785, ch. 722, § 7, 54 Stat. 899, 906-07 (1940).

Interstate Commerce Commission v. Railway Labor Exec. Ass'n., 315 U.S. 373, 377 (1942).

The process then began by which the Commission developed the employee protective conditions imposed by it. At first the Commission reserved jurisdiction to consider the protections to be imposed if it was later informed that the employees had actually been affected adversely. *Minneapolis & St. L. R.R. - Reorganization,* 244 I.C.C. 357 (1941). In 1944, the Commission detailed five conditions intended to protect employees in a purchase for a period of four years from the effective date of its order. *Oklahoma Railway Trustees - Abandonment of Operations,* 257 I.C.C. 177 (1944). Later, the Commission took the position that the four years was a maximum and employees first adversely affected after that period would have no protection, but this Court, in reversing that decision in *Railway Labor Exec. Ass'n. v. United States,* 339 U.S. 142, 155 (1950), concluded from a reading of the legislative history of section 5(2)(f):

> The Commission has the power to require a fair and equitable arrangement to protect the interests of railroad employees beyond four years from the effective date of the order approving the consolidation.

Upon remand, the Commission, in promulgating the so-called *New Orleans* conditions that subsequently were imposed in numerous cases, said: "From the beginning we have patterned the conditions which we have prescribed after the Washington Agreement." *New Orleans Union Passenger Terminal Case,* 282 I.C.C. 271, 280 (1952).

This rationale was reaffirmed in a decision on remand in *Southern Ry. - Control - Central of Georgia Ry.,* 331 I.C.C. 151, 164 (1967). More importantly, the Commission

expressed its views—at that time at least—that it did not have authority to supersede collective bargaining agreements; the employees' rights under those agreements were independent of any rights they had under the Commission approved conditions; the Commission conditions applied "after the carriers have arrived at their adjustments of the labor forces *in accordance* with the governing provisions of their collective bargaining agreements so that the carriers may be enabled to carry an approved transaction into effect" (citing *Texas & N.O. R.R. v. Brotherhood of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962)); and the transportation and labor laws were to be accommodated. *Id.*, 168-170.

In enacting the Rail Passenger Service Act of 1970 ("RPSA"), Pub. L. No. 91-518, 84 Stat. 1327 (1970), the Congress provided for employee protection upon the transfer of passenger services from the railroads to the National Railroad Passenger Corporation (AMTRAK).[6] Section 405(a) of RPSA, 45 U.S.C. § 565(a), provides that "a railroad shall provide fair and equitable arrangements to protect the interests of employees affected by discontinuance of intercity rail passenger service," and section 405(b), 45 U.S.C. § 565(b), requires that those protective arrangements include provisions for:

(1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise;

(2) the continuation of collective bargaining rights;

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6. The language was taken from section 10(c) of the Urban Mass Transportation Act of 1964, Pub. L. No. 88-365, 78 Stat. 302, 307 (1964), subsequently renumbered as section 13(c), Pub. L. No. 89-562, Sec. 2(a)(1), 80 Stat. 715. *See* 49 U.S.C. § 1609(c).

> (3) the protection of individual employees against a worsening of their positions with respect to their employment; * * *.

The Secretary of Labor prepared a set of protective conditions and certified its compliance with 45 U.S.C. § 565(b). *See Congress of Railway Unions v. Hodgson,* 326 F. Supp. 68 (D. D.C. 1971).

Subsequently, section 402(a) of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, 62, amended section 5(2)(f) of the Interstate Commerce Act [now 49 U.S.C. § 11347], by including the following sentence:

> Such arrangement shall contain provisions no less protective of the interests of employees than those heretofore imposed pursuant to [section 5(2)(f) of this act] and *those established pursuant to section 405 of the Rail Passenger Service Act* (45 U.S.C. 565). (Emphasis supplied).[7]

After several years following the 1976 amendments and many Commission proceedings, the ICC fashioned conditions for use in abandonment cases in *Oregon Short Line R.R. - Abandonment - Goshen,* 360 I.C.C. 91 (1979); in merger, control and consolidation cases in *New York Dock Ry. - Control - Brooklyn Eastern District Terminal,* 360 I.C.C. 60 (1979), *aff'd sub nom. New York Dock Ry. v. United States,* 609 F.2d 83 (2d Cir. 1979);[8] and in trackage

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7. The 1976 Act also made imposition of similar employee protective conditions in abandonments mandatory. 49 U.S.C. § 10903(b)(2).

8. In *New York Dock Ry. v. United States,* the Second Circuit found the unions' historical treatment of labor protective arrangements more persuasive than those advanced by the amicus American Association of Railroads. ("AAR") 609 F.2d *supra* at 93, n.11.

rights cases in *Norfolk and Western Ry. - Trackage Rights - BN*, 354 I.C.C. 605 (1978), *as modified by Mendocino Coast Ry. - Lease and Operate - California R.R.*, 360 I.C.C. 653 (1980), *aff'd sub nom. Railway Labor Exec. Ass'n. v. United States*, 675 F.2d 1248 (D.C. Cir. 1982).

These conditions contain the notice and negotiation sections of the WJPA and the *New Orleans* conditions, much of the protection formulated by the Secretary of Labor under 45 U.S.C. 565, and the following prohibition against interference with RLA and contractual obligations:

> 2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

See 360 I.C.C. at 84, 99.

On October 14, 1980, Congress enacted the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895. Though significantly deregulating the railroad industry, Congress continued to provide for the protection of employees in regard to every action where they could be affected. *See e.g.*, 49 U.S.C. § 10505(g) ("Commission may not exercise its authority under this section . . . (2) to relieve a carrier of its obligation to protect the interests of employees as required by this subtitle"); 49 U.S.C. §§ 10910, 11123(a)(3) ("Commission shall require to the maximum extent practicable the use of the employees who would normally have

performed work in connection with the traffic subject to the action of the Commission").[9]

B. The Instant Dispute

On September 15, 1980, UP, MP and several other corporations filed applications with the ICC for authority under 49 U.S.C. §§ 11343 and 11344 to form a railroad system covering a substantial portion of the country west of the Mississippi River. The applications were opposed by a number of persons, including petitioner MKT, DRGW and the respondent unions, BLE and United Transportation Union ("UTU"). DRGW and MKT later filed responsive applications seeking trackage rights. In its application for trackage rights over various UP and MP tracks, including Kansas City and Omaha, MKT proposed using its own employees in operations. J.A. 164. DRGW, on the other hand, set out that it "'may, at its option, elect to employ its own crews for the movement of its trains, locomotives and cars'" over MP tracks. J.A. 165. In fact, Mr. A. H. Nance testified for DRGW before the ICC that DRGW would be "willing to sit down and work out any kind of arrangement you [UP-MP] want." J.A. 166.

On October 20, 1982, the Commission entered its decision approving the primary applications, subject to various conditions. *Union Pacific - Control - Missouri Pacific R.R.*, 366 I.C.C. 462 (1982), *aff'd in part sub nom. Southern Pacific Transportation Co. v. ICC*, 736 F.2d 708 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1172 (1985). One

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9. Although railroad employment stood at 1,226,421 in 1952, when the *New Orleans* conditions were fashioned, it dropped to 458,994 in 1980, when the Staggers Act took effect, and has further declined to 301,879. 1985 *Moody's Transportation Manual* page a29; ICC Bureau of Accounts A-300 Report for 1985. Though the consolidations may have resulted in a more efficient rail transportation system, they have not preserved jobs for rail labor as suggested by the amicus AAR (AAR Brief, p. 12).

of the conditions imposed was that MP and UP had to grant DRGW the right to operate over 619 miles of MP trackage from Pueblo, Colorado to Kansas City, Missouri, 366 I.C.C. at 572. Another condition was that MKT, among other things, was to be given the right to operate over MP tracks from Kansas City to Omaha and from Union, Nebraska to Lincoln, Nebraska, and also over UP tracks from Omaha to Council Bluffs, Iowa, a distance over 200 miles. 366 I.C.C. at 465.

As MP and UP had opposed the trackage rights requests of MKT and DRGW, the Commission did not have actual agreements before it when considering those applications. Therefore, the ICC decided:

> No agreements have been reached between the parties regarding the trackage rights for which we have found a need. We prefer that the parties set the terms of their trackage rights agreements wherever possible, and then seek our approval as required, 49 U.S.C. 11343. In the event the parties should be unable to reach agreement, we will set the terms for the trackage rights.

366 I.C.C. at 589.

Several other items were left unsettled, including revision of MKT's operating plan as unrealistic (*id.* at 569).[10]

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10. The ICC suggested that MKT revise its plan "to provide for service using two crews with the crew change occurring at an appropriative point between Kansas City and Omaha. Although operations using two crews would be more costly than using one crew, such operations appear feasible and could prevent operating problems relating to hours of service laws." This quotation points out that, at that time, the Commission did not consider 49 U.S.C. § 11341(a) as automatically immunizing MKT from the Hours of Service Act, 45 U.S.C. §§ 61-66, and other federal safety laws.

Other than this comment, the Commission made no reference to and cannot be viewed as having considered and decided that MKT or DRGW engineers should operate the trains over UP-MP tracks (*see* 366 I.C.C. 568-569, 572-578). In fact, the Commission's opinion is totally silent on crew selection. At several places in its opinion, the Commission discloses the criteria (*id.*, 562-565) and the monetary considerations upon which it bases its granting of various trackage rights (*id.*, 589-590). But, nowhere can one find any reference to crew manning by the Commission.

Although, as petitioners state, the unions, including BLE and UTU, may not have directed their challenges specifically to the subject of which crews would man the trackage rights trains, they did seek modification and expansion of the customarily imposed conditions due to the anticipated magnitude of the labor impacts and the time period they would cover. In response to the unions' arguments, the Commission said (*id.*, 621-622):

> As is our usual practice, we will impose the conditions specified in *Norfolk and Western Ry. Co. - Trackage Rights - BN*, 354 I.C.C. 605 (1978), as modified by *Mendocino Coast Ry., Inc. - Lease and Operate*, 360 I.C.C. 653, 664 (1980) on the trackage rights approved as part of the primary application.[138] Similarly, in the DRGW, SP, and MKT responsive trackage rights applications which we are approving, . . . we find that employees will be adequately protected by imposition of protective conditions specified in *NW-BN*, as modified in *Mendocino*. *Railway Labor Executives Ass'n. v. United States*, 675 F.2d 1248 (D.C. Cir. 1982).

138. The *NW-BN-Mendocino* conditions are similar to the *New York Dock* conditions, but are applied in the con-

> text of trackage rights proceedings. The imposition of these conditions here is a matter of consistency but has little practical significance, since *all affected employees of applicants will also be covered by the New York Dock conditions imposed on the primary transaction.* (Emphasis supplied).

Clearly, on October 20, 1982, the ICC did not view its order as decisive of labor relations matters, and did not indicate that it had ruled on crew assignments.[11]

Both sets of employee protection conditions imposed required the rail carriers to which they related to preserve all "rules, working conditions and all collective bargaining and other rights, privileges and benefits . . . under applicable laws and/or existing collective bargaining agreements or otherwise. . . ." 354 I.C.C. at 610; 360 I.C.C. at 84. Further, as previously explained, both sets of conditions require advance notice of the transaction to all "interested employees" and their employee representatives and negotiation of an agreement to provide for, among other things, "the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case. . . ." *See,* Article I, Section 4 of the *New York Dock* conditions, 360 I.C.C. at 85; and *Norfolk & Western* conditions, 354 I.C.C. at 610.

None of the carriers involved (MP, MKT or DRGW) gave the MP locomotive engineers represented by BLE

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11. As a final note on labor protection, the Commission rejected two conditions raised by the American Train Dispatchers Association, one of which requested an order providing that "no transfer of [Western Pacific] or MPRR train dispatching work, or transfer of certain train dispatchers be accomplished without further order of the Commission after notice and opportunity for a hearing." The Commission rejected the imposition of a notice and hearing requirement as "unduly burdensome" and held "in the event employees might be impacted in the future, as a result of this consolidation, they will be afforded the protections we have imposed here."

the advance notice prescribed by the employee protective conditions. On November 5, 1982, DRGW entered into a stipulation with the UP-MP "setting interim compensation terms and providing for the applicants to provide operating assistance to DRGW in implementing the trackage rights." J.A. iii, No. 22, Decision in Finance Docket No. 30,000 (Sub-No. 18). Thereafter, DRGW began its trackage rights operations over MP tracks with MP crews manning its trains. J.A. 6. In early January 1983, MKT began to perform the trackage rights operations under an agreement in principle reached with UP-MP in November 1982. J.A. 74. Unlike DRGW, however, MKT used its own employees.

On February 1, 1983, MP advised its engineers represented by BLE of the trackage rights granted DRGW between Pueblo, Colorado, and Kansas City, Missouri and, for the first time, informed them that "MP and D&RGW have entered into an agreement that provides for using MP crews on D&RGW trains for a temporary, interim period, after which they will operate the trains with their crews." *Id.* After pointing out that at some point DRGW planned to have sufficient tonnage to run trains consisting of their own tonnage, MP stated:

> The exact date D&RGW will start using their crews on their trains is not known at this time. However, when D&RGW lets us know when they will start manning their trains, we will give you this information.

Id.

BLE then protested the use of DRGW and MKT crews on MP trackage on the ground that DRGW and MKT engineers did not have the right to operate trains over

MP trackage and that the agreements between the railroads resulted in an unauthorized change of working conditions in violation of the RLA. The railroads took the position that the Commission's order required the use of DRGW and MKT crews.

Unknown to BLE, the respondent UTU had threatened to strike MP for allowing MKT crews to operate trains over MP tracks, and MP obtained a strike injunction on March 30, 1983. *Missouri Pacific R.R. v. United Transportation Union*, 580 F. Supp. 1490, 1507 (E.D. Mo. 1984), *aff'd*, 782 F.2d 107, 110 (8th Cir. 1986), *petition for cert. filed*, 54 *U.S.L.W.* 3463 (U.S. Dec. 18, 1985) (No. 85-1054).

Shortly thereafter, on April 4, 1983, BLE filed a Petition for Clarification with the ICC in which it asked the Commission to clarify its October 20, 1982 decision as to crew manning. BLE pointed out that its understanding of the situation was reached from recent communications from MP that the ICC order mandated use of the DRGW and MKT crews. BLE noted that the protections imposed by the ICC did not require the tenant lines to use their employees to operate the trains or "even purport to treat with this subject." J.A. 4.

BLE stressed that interpreting the protections as mandating the use of DRGW and MKT crews "would be contrary to the purposes of the Interstate Commerce Act" by leading to "payment of displacement and dismissal allowances to MP crews who would be needlessly affected by the transaction by the hiring of new employees to perform this work" and by payment of removal allowances to employees of DRGW and MKT required to transfer, "thereby reducing the economics and efficiencies con-

templated by the Commission's approval of these transactions." J.A. 4. Moreover, BLE asserted that the Commission did not have jurisdiction over crew assignments and manning of positions, a holding that the Commission had historically applied in numerous previous decisions. J.A. 4.

The Commission denied BLE's petition in an order served on May 18, 1983. In that decision, the Commission concluded: "The consolidation decision does not require clarification." Pet. App. 53a. To the Commission, BLE was "attempting to reargue an issue that has already been decided." Pet. App. 54a. In sum, the Commission held that it had jurisdiction of crew assignments and manning of positions and that it naturally followed that DRGW and MKT could use their own crews.

On May 31, 1983, BLE filed with the ICC a "Petition for Reconsideration" of its May 18 order, J.A. 48-54. BLE stated that the Commission had "failed to consider its prior precedent on the issue which unequivocally hold that the subject of crew assignments and manning are labor disputes to be adjusted under the procedures of the Railway Labor Act." J.A. 49. In addition, BLE contended that "the Commission's ruling contravenes Section 2 of Article I of the New York Dock protective conditions imposed by the Commission in this docket and thereby is not in accord with the statutory mandate set forth in 49 U.S.C. 11347." *Id.*

Indicating the decision authorizing use of the lessee railroad's crews was contrary to the policy set forth in the Interstate Commerce and Railway Labor Acts, BLE made the following conclusion and prayer for relief:

> In sum, the Brotherhood of Locomotive Engineers submits that the Commission does not have jurisdiction over these labor disputes since such matters are within the purview of the Railway Labor Act, and respectfully requests that the Commission grant this petition for reconsideration and issue an order holding that crew assignments and manning of positions are matters not within the jurisdiction of the Commission but are labor disputes to be resolved under the procedures of the Railway Labor Act.

J.A. 54.

On June 7, 1983, UTU also petitioned ICC for reconsideration of its May 18, 1983 order, J.A. 71-84. UTU asked the ICC to rule that its order had not relieved any railroads from their obligations under the Railway Labor Act or the conditions imposed to protect the interests of the railroad employees.

The Commission denied the petitions for reconsideration on October 25, 1983. Pet. App. 60a. The ICC held that it had jurisdiction under 49 U.S.C. § 11341(a) to exempt a transaction approved under 49 U.S.C. §§ 11343 and 11344 from the provisions of the Railway Labor Act. Pet. App. 54a. Having found the power to exempt, the Commission then held that the exemption automatically flowed from its order:

> The terms of section 11341 immunizing an approved transaction from other laws are self-executing and there is no need for us expressly to order or to declare that a carrier is expressly relieved from certain restraints.

Pet. App. 60a.

In December, 1983, BLE and UTU filed with the District of Columbia Circuit petitions for review of the ICC's orders of May 18, 1983 and October 25, 1983. Among other things, the unions argued in their petitions that the ICC exceeded its authority by exempting the carriers from the requirements of the Railway Labor Act in regard to crew selection and assignments and that this action contravened the employee protection requirements of 49 U.S.C. § 11347 and the *N&W* conditions imposed in the ICC's approval of the trackage rights applications of DRGW and MKT pursuant to Section 11347.

On May 3, 1985, the Court of Appeals in a 2-1 decision vacated the ICC's decision, stating:

> We thus vacate the 1983 orders and leave the parties to their Railway Labor Act remedies. In doing so we intimate no view on the merits of the unions' claims about their underlying right to a role in crew selection. The Railway Labor Act is designed to resolve such issues, and we leave the parties to the mechanism created by Congress.[10]

10. The dissent professes some puzzlement at the reason for vacating the ICC decisions. The reason is clear. This issue belongs within the structure created by the Railway Labor Act. Holding so does not assume "a conflict between the approved crew selection provisions and the unions' asserted rights." Dissent at 8. Rather, it leaves that question to the mechanisms created by Congress. That, of course, is the reason we do not "indicate what the parameters of the unions' claimed rights might be," id.: under the statutory scheme, it is not, at this point, our province to do so. All we decide is that ICC's claimed exercise of exemption authority was insufficient to immunize crew selection from the provisions of the Railway Labor Act.

Pet. App. 21a. The dissent, on the other hand, accepted the Commission's argument that the exemption from the Railway Labor Act was self-imposed by reason of 49 U.S.C. § 11341.

Subsequently, the Commission and the affected railroads petitioned for rehearing with suggestion for rehearing en banc. On July 12, 1985, the panel *sua sponte* amended its opinion so as to delete footnote 10, *supra*, and to modify the concluding paragraph of the majority opinion so as to remand the proceeding to the Commission. According to the majority of the panel of the Court of Appeals (Judges Wright and Mikva), the Railway Labor Act dispute resolution procedures may not be dispensed with by the ICC without an adequate finding of necessity for doing so, and the Commission had never given a reasion for removing crew selection from the Railway Labor Act bargaining process, Pet. App. 45a.

The petition for rehearing and suggestion for rehearing en banc were denied by the court below in orders dated August 9, 1985. Pet. App. 48a-50a. On March 24, 1986, this Court granted the petitions of the ICC and MKT for writs of certiorari to the District of Columbia Circuit Court of Appeals.[12]

SUMMARY OF ARGUMENT

Although rights to runs and crew assignments are vital to the livelihood of railroad operating employees, as demonstrated by decades of prior practices in the rail industry, Commission imposed crew requirements have not been and are not now essential to effectuation of a Commission approved transaction. Over the years there has been little controversy between the operating employees and their carriers as to the selection of the employees operating the

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12. The cross-petitions of BLE and UTU for certiorari are pending. (Nos. 85-983 and 85-997).

trains following consolidations or other ICC approved transactions, and there have not been any interruptions to commerce resulting from those issues. As a result, the Commission has not intervened in crew selection matters and, in fact, has professed lack of jurisdiction and expertise in these and other collective bargaining items. *Southern Railway - Control - Central of Georgia Ry.*, 331 I.C.C. 151, 170 (1967); *Illinois Central Gulf R.R. - Trackage Rights - Chicago & Illinois Midland Ry. Co.*, Finance Docket No. 28046 (Feb. 15, 1977). J.A. 7-8.

While the Commission's authority may be broad, it is not unbridled. *Northern Lines Merger Lines*, 396 U.S. 491, 503 (1970). The decision question must be answered with substantial evidence, and the Commission must reveal the standards it employed in reaching that decision. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196-197 (1947). Here, the Commission "never offered a word about waiving the Railway Labor Act with respect to the crew assignment in the trackage rights, much less the necessity for doing so" in its 1982 consolidation opinion. Pet. App. 19a. And while in its 1983 decisions arising from BLE's petition for clarification the ICC claimed that section 11341 had automatically relieved the carriers from their RLA and collective bargaining obligations upon issuance of its order approving the consolidation, the Commission never gave any justification for its new interpretation or for the change in its policy related to crew assignments and other collective bargaining matters, as it was required to do (*see NLRB v. Local Union No. 103, Int'l. Ass'n. of Bridge, Structural and Ornamental Iron Workers*, 434 U.S. 335 351 (1978)), nor did the Commission "give a shred of reasoning to support its view that completion of the transactions required shielding crew selection from the RLA," or the

notice and negotiation provisions of its own employee protective conditions. Pet. App. 19a.

In addition to the fact that the Commission has never considered crew assignment a subject to be decided by it and, therefore, has never taken evidence upon the economic aspects of such selection, no opportunity exists today for the Commission to hear and decide the issue in almost all cases. Except when part of a responsive application in a consolidation proceeding under sections 11343 and 11344, trackage rights transactions are handled under exemption procedures, which merely require the person engaging in the transaction to file a notice. *See, e.g.,* 49 C.F.R. § 1180.2 *et seq.*

Moreover, though the Commission and the MKT claim that the employee protective conditions imposed by the Commission pursuant to 49 U.S.C. § 11347 give the affected employees monetary protection from the adversities arising from the unilateral labor relations decisions made by the carriers by reason of the self-executing exemption allegedly contained in 49 U.S.C. § 11341, the Commission has taken further actions that, in some instances, deprive the employees of that protection which it argues serves as the basis of the exemption. *See, e.g., Simmons v. ICC,* 766 F.2d 1177 (7th Cir. 1985), *cert. denied,* 106 S. Ct. 791 (1986), which upheld an order of the ICC refusing to impose labor protective conditions upon a rail carrier that applied to abandon a line of rail and then sold it.

Thus, the reading of the language contained in section 11341(a) is extended too far by the Commission when it goes beyond the clear meaning of the wording that the transaction is exempt "from all other law . . . *as necessary to let that person carry out the transaction.*" (Emphasis

supplied). At no time or place has the Commission informed anyone as to why crew assignments in trackage rights cases in general and in this case in particular may not be negotiated and why that labor relations matter has been exempted from the procedures of notice and negotiation under the RLA. The Commission did not so find, and the courts should not accept later rationalizations for its actions. *See Burlington Truck Lines v. United States*, 371 U.S. 156, 168-169 (1962).

Moreover, the Commission's actions were defective in never having attempted to accommodate the provisions of the ICA and RLA. *Id.* at 172. Since the Commission-formulated employee protective conditions provide for notice and negotiation, and to that extent are no different than the procedures of section 6 of the Railway Labor Act, 45 U.S.C. § 156, the two Acts can be accommodated. *See* 354 I.C.C. at 610-611; 360 I.C.C. at 85.

With respect to the RLA, however, it appears to be beyond question that Congress has not manifested any intention to abrogate that Act. *Schwabacher v. United States*, 334 U.S. 182 (1948). Every amendment of the ICA, while providing carriers the opportunity to more easily obtain certain economies and efficiencies, has carried with it employee protections which embody the preservation and continuation of collective bargaining rights and the rates of pay, rules and working conditions in effect. At each stage of the historical development of the ICA, the protection of employees has been considered and broadened. Therefore, one cannot conclude, as the Commission suggests, that Congress manifested an intention to abrogate the RLA insofar as Commission approved or exempted transactions, when it has specifically provided

for the continuation of the collective bargaining rights, the employment rights and the statutory rights of rail workmen at various points of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (Oct. 14, 1980), and other railway legislation. In sum, those actions are not indicative of a congressional policy intended to deprive employees of a voice in the process of determining which persons may run the trains engaged in Commission approved trackage rights operations.

This Court in *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156 (1962), warned the ICC not to contravene the national policy as to labor relations or to invade the authority of the agencies given that jurisdiction. And in *Order of Railroad Telegraphers v. Chicago & N.W. Ry.*, 362 U.S. 330, 339-340 (1960), the Court confronted with a similar kind of argument by the railroads said: "There is no express provision of law, and certainly we can infer none from the Interstate Commerce Act, making it unlawful for unions to want to discuss with railroads actions that may vitally and adversely affect the security, seniority and stability of railroad jobs."

The RLA has long served as the basis for labor management harmony and industrial peace in the railroad industry. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 379 (1969). Although arguments have been advanced to substitute compulsion and anti-strike measures in place of the RLA, the RLA and its promotion of collective bargaining have been "thought essential by Congress" in the operation of an efficient interstate rail system. *See United Transportation Union v. Long Island R.R.*, 455 U.S. 678, 688-689 (1982).

ARGUMENT

THE COMMISSION MUST ENTER FINDINGS OF NECESSITY IN ORDER TO RELIEVE A CARRIER FROM ITS RAILWAY LABOR ACT AND CONTRACTUAL OBLIGATIONS TO NEGOTIATE UPON CREW MANNING ISSUES WITH ITS EMPLOYEES.

The Court of Appeals correctly held that the Commission's approval of a transaction under section 11344 of the ICA is insufficient to exempt a rail carrier from its obligations under the RLA and its labor contract unless the ICC gives a reasoned explanation why crew selection is so essential to the " 'pro-competitive' purpose that the otherwise applicable provisions of the Railway Labor Act must be waived." Pet. App. 19a-20a & n.8. Consistently in the years prior to the time that the involved applications were approved and BLE filed its petition for clarification, the ICC had rejected any jurisdiction over crew manning and denied having any expertise in labor relations matters. Moreover, the employee protective conditions specifically required the existing rates of pay, rules and working conditions set forth in the collective bargaining agreements be maintained until changed by agreement or applicable statute, and contained a notice and negotiation procedure for the selection of work forces. In addition, the Commission had rejected evidence on the items that it now asserts BLE and UTU failed to present proof. Accordingly, BLE assumed—we submit appropriately—that the ICC would not change its mind—at least not without some notice and sufficient reasons for its new interpretation—and would through clarification of its order of October 20, 1982, inform the parties of the procedures available to determine crew manning.

Under well-established principles, the ICC was required to make a specific finding that the exemption from the RLA and existing collective bargaining agreement provisions was necessary and to provide sufficient reasons for that determination.[13]

In addition, the holding below was consistent with all legal precedent. Furthermore, until the briefs were filed herein, the Commission never attempted to justify its position that a self-executing exemption from the RLA is required and that any procedure for employee participation, whether under the RLA or the Commission imposed conditions, would hinder the consolidation. In fact, by reason of the Commission's newly promulgated class exemption procedures—and its refusal to prescribe protective conditions in many instances—there is no forum to "decide"

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13. The Government argues in a footnote (see Govt. Brief, p. 22, n.16) that the Court of Appeals improperly expanded the scope of its review, because (a) the unions' petitions for review were timely only for the purpose of reviewing the Commission's denial of BLE's petition for clarification, and (b) the unions failed to present any evidence before the ICC that the UP-MP employees "have rights under collective bargaining agreements to participate in the trackage rights crew selection." However, as the court below appropriately held (Pet. App. 12a), based upon precedent in these matters and the "ICC's general pronouncement that the labor protective conditions would not be violated," the issue of crew assignment under those labor protection conditions "did not become ripe for review until the Commission had specified that crew selection was exempt from all otherwise applicable legal requirements." This issue cannot be conceivably related to the Commission's final consolidation decision as suggested by the Government. As to the suggestion that the unions failed to present evidence of collective bargaining rights, we note that (1) the Commission generally would not accept that evidence as significant, (see *infra*, at 28-33); (2) the Commission in giving short shrift to BLE's petition did not consider the labor contract's provisions as relevant in this case; and (3) it is implausible that anyone with knowledge of seniority rights and contracting out cases replete in the labor relations authorities would not be on notice that labor agreements contain clauses providing, *inter alia*, for seniority and performing the employer's work. (*infra*, at 41-42).

crew questions and, therefore, no basis for an automatic exemption under section 11341 in any event.

A. The Commission Has Consistently Excluded Itself From Participating In Or Deciding Labor Relations Matters.

As early as 1952, the ICC in *Gulf, M. & O. R.R. Abandonment,* 282 I.C.C. 311, 331-32 (1952), claimed: "This Commission, over a long period of years, has uniformly held that it has no power to reform contracts or to relieve carriers of their financial obligations thereunder * * *." In this connection, the Commission continued:

> The applicant fails to draw the distinction between conditions which affect only the applicant and give it the alternative of doing one thing or another, and conditions which would impair State laws or vested rights of the parties. The latter we may set aside only upon a clear grant of authority similar to that contained in Section 5(11) [now 49 U.S.C. §11341].
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> * * * [W]e are of the opinion that we are not authorized by order to declare that the obligations created by the contract between the applicant and the Illinois Central are set aside other than to the extent necessary to effect a compliance with our certificate * * *.

Id., 335.

Subsequently, in *Southern Railway - Control - Central of Georgia Ry.,* 331 I.C.C. 151, 170 (1967), the Commission expressed the view that the exemption granted by section 11341 did not extend to those proposals before the ICC which dealt with the applicant's intention concerning rail labor. As to the employees' contractual rights, including work rights, the Commission concluded:

> By its terms, section 5(11) applies only to anti-trust and other restraints of law from carrying "into effect the transaction so approved * * *." Neither the Washington Agreement nor the specific collective bargaining agreements between these roads and their employees is such a restraint, for indeed section 5 transactions have been successfully consummated in full compliance with such terms * * *.
>
> The designated "exclusive and plenary power" of the Commission in section 5(11) cannot be so broadly construed as to brush aside all laws—be they statutorily created anti-trust laws or voluntary contractual agreements made binding by the force of law * * *.

From this foundation, the ICC, prior to this case, consistently refused to become involved in labor matters. For example, in *Leavens v. Burlington Northern, Inc.*, 348 I.C.C. 962 (1977), a case involving an attack by an individual employee on the protective conditions resulting from a merger which had been agreed to by the union and the railroad, the Commission explained:

> The Commission did not intend to place itself in the fields of collective bargaining or labor management relations nor do the provisions of the Interstate Commerce Act require it. We should be careful so that we do not, because of lack of expert competence, contravene the national policy as to labor relations.

Id., 975. In a concurring opinion, Commissioner Gresham said that there is "no statutory basis for our intrusion in any way into the collective bargaining process." *Id.*, 983.

On the heels of this decision, the Commission declined to become involved in a crew assignment dispute, stating in terms apropos to this case:

> That the crew assignment provision was not imposed by the Commission in the exercise of its jurisdiction under section 5(2)(f) of the Act but is a provision negotiated into the agreement by the ICG and the C&IM; that the Review Board expressly asserted the Commission's subject matter jurisdiction solely over matters affecting transportation services and determined only that this provision and other provisions in the agreement would have no adverse transportation effects; that as to all other subject matters including matters relating to labor relations as may fall within the purview of the Railway Labor Act the Board declined jurisdiction over such questions; and that, the Commission [has] no jurisdiction to either impose crew assignment provisions or to remove said provisions * * *.

Illinois Central Gulf R.R. - Trackage Rights - Chicago & Illinois Midland Ry. Co., Finance Docket No. 28046 (Feb. 15, 1977), J.A. 7-8.

The Commission also has held that it "has no authority to involve itself" in disputes arising out of employee protective conditions in which it has prescribed arbitration "in lieu of a Commission proceeding as the remedy for employee complaints." See *Brotherhood of Locomotive Engineers v. Louisville & N. R.R. and Missouri Pacific R.R.*, Finance Docket Nos. 29733 and 29786 (June 10, 1982) (Slip op. 5-6), on appeal to the U.S. Court of Appeals for the D.C. Circuit, Case No. 82-1944; and *Haskell Bell v. Western Maryland Ry.*, 366 I.C.C. 64, 67 (1982).

In *Brotherhood of Locomotive Engineers v. Chicago & N.W. Transportation Co.*, 366 I.C.C. 857 (1983), the ICC denied an appeal by the BLE from the dismissal of its

complaint alleging that the Chicago and North Western was operating over a line of the Indiana Harbor Belt in violation of 49 U.S.C. § 11343, thereby denying locomotive engineers on the latter railroad of employment and rights under 49 U.S.C. § 11347. Once again the Commission said that it would not become involved in labor management decisions and that it is not responsible for resolving labor controversies. The ICC said:

> BLE wants us, in effect, to arbitrate its dispute with IHB. This we will not do. As we pointed out in *Leavens, supra,* we lack the expertise to place ourselves into the fields of collective bargaining or labor management relations.

Id., 861.

Therefore, in the instant case, BLE reasonably anticipated that, in response to its petition for clarification, the Commission would advise that it had not imposed any crew assignment provisions because it had no jurisdiction to do so, and further would direct the parties to the procedures of the RLA or, at least, to the notice and other Article I, Section 4 procedures contained in the employee protective conditions imposed by it, which, of course, MP, MKT and DRGW have not followed. However, failing to treat these matters uniformly, the ICC then became directly involved in a labor relations matter—a dispute as to which employees shall operate trains.

Surprisingly, this switch in philosophy has not hindered the ICC in recent months from reverting to its original hands-off labor relations policy. In *Santa Fe Southern Pacific Corp. - Control - Southern Pacific Transportation Co.,* Finance Docket No. 30,400 (Dec. 9, 1985), the railroads involved in a consolidation under sections 11343

and 11344 sought an order to compel the rail labor unions to enter into negotiations, and ultimately binding arbitration, concerning implementation of rail employee protective conditions prior to Commission approval of the transaction. Specifically, the carriers asked the Commission to prescribe "procedures, under 49 U.S.C. § 11341, so as to displace the procedures established under any contrary provisions of the Railway Labor Act, 45 U.S.C. § 151 *et seq.* (RLA)." The Commission held:

> The petition presents two issues—whether we have the authority to grant the relief and, if so, whether we should do so. Applicants have not persuaded us on either basis that we could or should supercede (sic) RLA and alter existing labor agreements in advance of a decision on the merits of this case or a determination of the level of employee protection that may be imposed if the merger is approved. The decision in *Southern Ry. - Purchase - Kentucky & Indiana Terminal R.R.*, F.D. No. 29690, served March 3, 1982 (unpublished), (K&ITR), does not support applicants' request. There we declined to get involved in the collective bargaining process by enjoining, at the request of rail labor, negotiations that were proceeding under the *New York Dock* conditions. Here we are again being asked to affirmatively become involved in the collective bargaining process by mandating negotiations and, if necessary, binding arbitration and we similarly decline to do so. Therefore, we will deny the petition.

See App. A, *infra*, at A1.

Later, in *Lackawanna County Railroad Authority, Inc. - Exemption From Regulation*, Finance Docket No. 30628 (Jan. 24, 1986) (App. B, *infra* at A3), *appeal pending*, No.

86-3231 (3rd Cir.), in which the Commission exempted Lackawanna Valley Railroad from the requirements of 49 U.S.C. Subtitle IV, the Commission rejected BLE's contention that the Commission may not, through the exemption process in which no hearing is held, deny employee protection and at the same time relieve the owning carrier's work assignment commitment to its employees in consideration of a wage deferral agreement. The Commission said:

> Whether or not the agreement between D&H and its employees is a matter that applies to these transactions is outside of our jurisdiction. Therefore, our refusal to impose labor protection, in the face of this agreement is not an abuse of discretion, and would not resolve any conflict [sic] it.[14]

App. B at A9.

Thus, consistently over the years prior to this case, and even now, the Commission has taken the position that the issues of crew selection and seniority are to be handled under the collective bargaining prescribed by the RLA and that it lacks the expertise and authority to deal with labor management relations. Accordingly, it is beyond cavil that the Commission did not consider or even

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14. In *Penn Central Merger - Matter of Larry Zapp*, Finance Docket No. 21989 (I.C.C. May 13, 1986) resulting from the decision in *Zapp v. United Transportation Union*, 727 F.2d 617 (7th Cir. 1934), the Commission said with respect to its role in imposing employee protective conditions and any determination as to the propriety of Zapp's seniority standing resulting from the implementation of the Commission's order:

> This responsibility does not require nor has it been the intention of this Commission to displace collective bargaining as the appropriate vehicle for establishing seniority, or to displace arbitration as the proper means for determining whether an employee is affected by a transaction and the specific benefits occurring from that status.

think about the crewing issues in its October 20, 1982 decision.[15]

B. The Commission Failed To Provide Any Justification For Its View That The Carriers Are Automatically Immunized From The RLA And Their Contractual Obligations.

Although the ICC has broad discretionary power, that authority is not unlimited. Its decisions are subject to review on the basis of whether the law has been properly interpreted and applied and whether the decision question has been based on substantial evidence. *Northern Lines Merger Cases*, 396 U.S. 491, 503 (1970).

In the instant case, the ICC once again appears to have made a result-oriented decision which would impose its will over that of Congress. In vacating another result-oriented decision, the Court of Appeals for the District

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15. Notwithstanding the most recent pronouncements of the ICC, on August 22, 1985, the Commission said that the provisions of both the WJPA and the RLA have been "reflected and subsumed in the conditions imposed by the Commission." *Maine Central R.R., Georgia Pacific Corp., Canadian Pacific & Springfield Terminal Ry. - Exemption From 49 U.S.C. 11342 and 11343*, Finance Docket No. 30532 (Aug. 22, 1985), *appeal pending*, No. 85-1636 (D.C. Cir.). See Pet. Add. 40a, at 49a. If, as the Commission contends therein, the Commission's labor protective provisions provide for compulsory binding arbitration "to arrive at implementing agreements if the parties are unable to do so, so that approved transactions can ultimately be consummated," the ICC's application of section 11341 as a self-executing exemption in the instant case deprived the employees represented by BLE on MP of the use of those procedures. However, a full reading of that opinion establishes that the Commission, in response to the decision below, is now saying that the RLA, the WJPA, and even the ICC imposed protections of the collective bargaining rights of the affected employees are preempted and set aside by its order exempting a financial transaction from the requirements of the ICA. In short, the Commission appears to be coming up with arguments that were not even conceived at the time it entered its order on October 20, 1982.

of Columbia Circuit recently said that the ICC "cannot hide the standards under which it operates, for we are unable to evaluate whether its reasoning meets the reasoned decision making requirement unless we know against what standards its factual findings have been judged." *Coal Exporters Ass'n. v. United States*, 745 F.2d 76, 99 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 2151 (1985). *Also see SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

Until this case, the Commission has interpreted the ICA as not providing it with jurisdiction over labor relations and collective bargaining matters and has held that determinations of seniority and crew assignment matters are best left to the procedures of the RLA and the imposed employee protective conditions. The Court of Appeals below appropriately noted that the "ICC's analysis of the necessity for waiving the Railway Labor Act, however, is virtually nonexistent," and "the Commission did not give a shred of reasoning to support its view that completion of the transaction required shielding crew selection from the Railway Labor Act." Pet. App. 19a.[16] Thus, it follows that:

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16. To support its interpretation and application of section 11341 as self-executing in this case, the ICC apparently relies on *Brotherhood of Locomotive Engineers v. Chicago & N.W. Ry.*, 314 F.2d 424 (8th Cir. 1963), *cert. denied*, 375 U.S. 819 (1963), although the Commission had never adopted that reasoning previously. Actually, that case, which arose from a declaratory action by a carrier, only stands for the proposition that to the extent the involved railroads and unions have entered into an agreement, which is approved by the Commission and made part of its conditions, the carrier is removed from obstacles posed by the RLA that would defeat the consolidation. *See also* opinion of court below, at Pet. App. 18a n.6, further distinguishing the Eighth Circuit's decision. Here there is no voluntary agreement setting the levels of employee protection. Nevertheless, at most, that decision holds that the compulsory arbitration provided by that agreement is the procedure to be followed in

(Continued on following page)

> Whatever deference must be accorded "the interpretation of a statute by an agency charged with its enforcement", *Meade Township v. Andrus,* 695 F.2d 1006, 1009 (6th Cir. 1982), such an agency, at the very least, must be held to its own interpretation. While an agency may not be "disqualified from changing its mind", it must give sufficient reasons for its new interpretation. Otherwise, a reviewing court cannot "approach the statutory construction issue . . . with[] regard to the administrative understanding of the stataute[]." *NLRB v. Local Union No. 103,* 434 U.S. 335, 351 (1978); see majority op. at 1186. No reasons whatsoever were given by the ICC for the broad change in its interpretation of the Act in the instant case.

Crounse Corp. v. ICC, 781 F.2d 1176, 1198-1199 (6th Cir. 1986) (Timbers, *J.*, dissenting), *petition for reh'g denied,* 787 F.2d 1031 (6th Cir. 1986).

On this basis alone, the Court of Appeals correctly held that the Commission could not automatically rely upon

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Footnote continued—

adjusting the seniority rights of the employees affected by the consolidation. Rather than detracting from the decision below, the Eighth Circuit's expressions further it by establishing that the merits of the subject were not touched by the Commission's order; section 11341 merely activated the ultimate decision-making procedure as to a direct aspect of the consolidation. The dichotomy in ICC's reasoning is typified by its decision of October 19, 1983 in which it denied reconsideration, when it attempted to distinguish its decisions in *Illinois C. G. R.R. - Trackage Rights - over Chicago & I. M. Ry.,* Finance Docket No. 28046 (Feb. 15, 1977), and *Cairo Terminal Railroad - Trackage Rights Exemption - Illinois C. G. R.R.,* Finance Docket No. 30138 (May 17, 1983), that the Commission would not inject itself in crew assignment and other labor disputes, on the basis that the former case involved a negotiated agreement and the latter arose in an exemption proceeding under 49 U.S.C. §10505. Obviously, the Commission is saying the exemption is not automatic in those instances.

section 11341, but, "must explain why termination of the asserted right to participate in crew selection is necessary to effectuate the pro-competitive purpose of the grant of trackage rights or some other purpose sufficiently related to the transaction." Pet. App. 45a.

The Commission's decision on clarification that its approval automatically immunized the carriers from the procedures of the RLA, and even the Commission-imposed protective conditions, clearly overreaches its authority. And the purported basis for that decision, *i.e.*, the references in the applications to the use of the tenant railroad's employees and the approval of the trackage rights agreements in subsequent compensation hearings, no longer exists in the usual trackage rights case. *See Railroad Consolidation Procedures - Trackage Rights Exemption*, Ex Parte No. 282 (Sub-No. 9) (April 19, 1985); 49 C.F.R. §§ 1180.2, 1180.6. Since trackage rights agreements have been afforded a class exemption, except when sought as conditions to a rail consolidation, no application need be filed with the ICC and no forum is available to raise the issues the Commission contends should be raised in the public interest phase of its proceedings. Under such circumstances the exemption cannot be self-executing, because there is no basis for its invocation.

C. The Court of Appeals Correctly Held That The Commission Must Make A Finding Of Necessity To Exempt Crew Selection From The RLA And Collective Bargaining Procedures.

1. The exemption contained in section 11341 is not as broad as asserted by the ICC but only extends by its terms to those exclusions "necessary to let that person carry out the [approved or exempted] transaction." Thus,

the ICC's authority to approve trackage rights agreements, while it may be plenary, is not absolute or without meaningful limitations.

In *City of Palestine v. United States,* 559 F.2d 408 (5th Cir. 1977), *cert. denied,* 435 U.S. 950 (1978), the Fifth Circuit ruled that the ICC had exceeded its authority under section 11341 by abrogating certain agreements requiring one of the railroads involved in a consolidation to maintain an office and a certain percentage of its work force in Palestine. Although an agreement may be burdensome, that Court of Appeals said:

> In its grant of authority, Congress did not issue the ICC a hunting license for state laws and contracts that limit a railroad's efficiency unless those laws or contracts interfered with carrying out an approved merger.

Id., 414.

Congress, as this Court found in *Schwabacher v. United States,* 334 U.S. 182 (1948), has manifested an intention not to abrogate state law unless it interferes with carrying out an approved merger. That principle is much stronger here, for 49 U.S.C. § 11347 would be superfluous if the RLA and the contractual obligations of the railroads to their employees were automatically exempted. The employees would be deprived of their statutorily guaranteed continuation of collective bargaining rights, rates of pay, rules and working conditions embodied in agreements, and their rights under the RLA. In *Schwabacher v. United States, supra,* the ICC declined in a consolidation to consider claims of dissenting shareholders under state law, because it thought it lacked jurisdiction. *Id.,* 201-202. This Court later remanded to

the Commission to make specific findings whether the stock valuation was just and reasonable to these claimants with directions to consider state law to the extent it might affect the intrinsic value of their stock, even though the Commission had found the public interest in the plan as a whole was just and reasonable. In this case, to the extent that the Commission refused to specifically consider and find that the resolution of crew manning was necessary to the transaction and that the specific terms were just and reasonable, it erred.

Moreover, the Fifth Circuit has held that the term "transaction" used in 49 U.S.C. §§ 11341(a) and 11343 (a) is, for exemption purposes, limited to the transfer of the right to DRGW and MKT trains to use certain MP and UP lines and does not extend to the subject of the employees manning those trains. *Texas & N.O. R.R. v. Brotherhood of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962). In sum, the section 11341 exemption is limited to those laws and statutory proscriptions which prevent the consummation of the transaction authorized by the ICC, and the scope of that exemption is limited to the powers "necessary to let the person carry out the transaction."

2. In light of the limitations upon the ICC's powers, there must be adequate and proper findings by it to support any decision that it, in fact, determines that termination of the employees' right to participate in crew selection is necessary. *SEC v. Chenery Corp.*, 332 U.S. 194 (1947). In short, the grounds for its decision must be clear and to the point, for the reviewing court "must know what a decision means before the duty becomes ours to say whether it is right or wrong." *Id.* at 197, citing *United States v. Chicago, M., St.P.&P. R.R.*, 294 U.S. 499, 511 (1935).

These principles were given further meaning in *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156 (1962), which involved the relationship of the ICA to the federal labor relations laws. Unionized trunk line motor carriers refused to handle goods from nonunion short line truckers under the "hot cargo" clauses in their labor contracts. The short line carriers organized another company and applied to the ICC for authority to act as an interstate carrier, and the ICC granted the application. Shortly thereafter, the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*, was amended, placing in issue the validity of the union induced boycott. A three-judge district court affirmed. In reversing, this Court found that the Commission had a choice of remedies, and held that the ICC had failed to properly justify its choice of remedy and disclose the grounds for its order. In discussing the relationship between the ICA and the labor laws, the Court said:

> . . . Commission should be particularly careful in its choice of remedy, and should have been particularly careful, because of the possible effects of its decision on the functioning of the national labor relations policy. The Commission acts in a most delicate area here, because whatever it does affirmatively . . . may have important consequences upon the collective bargaining processes between the unions and employees. The policies of the Interstate Commerce Act and the Labor Act necessarily must be accommodated, one to the other.
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> Implicit in this analysis is a recognition that if either agency is not careful it may trench upon the other's jurisdiction, and because of lack of expert

competence, contravene the national policy as to transportation or labor relations.

Id., 172-173.

In the instant case, the ICC, in denying clarification of its order and application of the employee protective conditions imposed by it, states that its earlier orders "unambiguously specified that trackage rights tenants may perform operations using their own crews." J.A. 36. However, when those prior decisions are examined, it becomes apparent that the ICC merely indicated that the tenants proposed to use their own crews, not that this was a requirement. Clearly, the ICC did not examine the terms of the trackage rights agreements and made no findings that could be a basis for its order.

However, in its "clarification", the ICC did not even stop at this point. It claimed that it meant to grant the railroads immunity from the RLA and to give them the right to select the employees of MKT or DRGW to perform work belonging to MP employees, work which is protected by the Railway Labor Act and which cannot be taken away without an agreement reached pursuant to said Act.[17] If a result like this could be reached by the ICC, it could be accomplished only after the ICC attempted to accommodate the policies of the RLA with those of the ICA. As set forth above, the accommodation would have to be explained by specific findings and supported by substantial evidence which shows that the ex-

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17. *See, e.g., St. Louis Southwestern Ry. v. Brotherhood of Railroad Signalmen*, 665 F.2d 987 (10th Cir. 1983), *cert. denied*, 456 U.S. 945 (1982), which held that a carrier, subject to an employee protective agreement imposed by the Commission in the purchase of certain lines of a bankrupt rail carrier, violated section 6 of the RLA, 45 U.S.C. § 156, by contracting out work on the purchased line.

emption under section 11341 is necessary to enable the trackage rights tenants to carry out the transaction approved by the ICC, *i.e.*, operation of MKT and DRGW trains over MP track, and that without such exemption, the trackage right operations could not be effectuated.

3. While the Government and MKT insist that crew mannings could be an obstacle to effectuating a transaction, there are no hard facts from which to draw that inference. Although railroad employment has declined from about 1,250,000 employees to approximately 300,000 over the years—a goodly portion of such decline resulting from consolidations, abandonments and other carrier financial transactions pursuant to the ICA—the lesson of the last four to five decades is that strikes or threats of major disruptions have not presented any obstacle to the completion of those transactions. And DRGW has conducted its trackage rights operations for three years with MP crews, which again proves that such operations are feasible and fiscally responsible.

Further, due to the procedures within the unions to handle such matters (see *supra*, 4), crew manning issues are unlikely to prevent trackage rights applications from being implemented. Although railroad employees do consider themselves as having a proprietary interest in the lines of rail over which they operate (*see, e.g., Primakow v. Railway Express Agency, Inc.*, 60 F. Supp. 691 (E.D. Wis. 1945)), as the dissenting opinion in the court below suggests, the use of the owning carrier's operating crews, in whole or part, should not constitute any financial hindrance to the tenant line due to the labor structure in the industry.

D. Application Of The RLA Procedures Would Not Impede The Implementation Of Commission-Approved Transactions.

The policy of encouraging collective bargaining, thereby granting railroad employees a voice in their employment life, pervades the federal railroad labor relations law. In fact, the dictation of crew assignments and other labor relations matters by railroads under the alleged imprimatur of Commission approval runs counter to the Congressional policy of encouraging collective bargaining "in order to prevent if possible, wasteful strikes and interruptions of interstate commerce." *Detroit & T. S. L. R.R. v. United Transportation Union,* 396 U.S. 142, 148 (1969). Thus, while the RLA procedures embodying that policy do not impede implementation of Commission approved transactions, even if they did, Congress, not the ICC, is the body empowered to modify those procedures.[18]

During 1923-24, the federal administration under Presidents Harding and Coolidge asked for modifications in the Transportation Act of 1920 to remedy weaknesses, particularly in the area of labor management relations. *The Railway Labor Act at Fifty,* National Mediation Board (G.P.O., Washington, D.C. 1976), at 7. In this context, the 1924 platform of the Republican Party proposed enactment of a Railway Labor Act, stating:

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18. Congress considers those procedures appropriate for even bankrupt railroads:

> Notwithstanding section 365 of this title, neither the court nor the trustee may change the wages or working conditions of employees of the debtor established by a collective bargaining agreement that is subject to the Railway Labor Act (45 U.S.C. 151 et seq.) except in accordance with section 6 of such Act (45 U.S.C. 156).

11 U.S.C. § 1167, Pub. L. No. 95-598, 92 Stat. 2642 (1978)

> Collective bargaining, mediation, and voluntary arbitration are the most important steps in the maintaining of peaceful labor relations and should be encouraged. We do not believe in compulsory action.

Id.

Under the urging of President Coolidge, a committee of railway executives and union representatives produced a draft of a bill in 1925 which ultimately became the RLA. *Id.* at 8. The RLA, which has been amended from time to time, has been the subject of decisions of this Court in a long line of cases over the past six decades. *Texas & N.O. R.R. v. Brotherhood of Railway and Steamship Clerks,* 281 U.S. 548 (1930), upheld the constitutionality of the Act, holding, among other things, that "the major purpose of Congress in passing the Railway Labor Act was to 'provide machinery to prevent strikes.'" *Id.,* at 565. In its numerous decisions on this subject, the Court has noted "the Act established rather elaborate machinery for negotiation, mediation and voluntary arbitration, and conciliation." *Detroit & T. S. L. R.R. v. United Transportation Union,* 396 U.S. 142, 148-149 (1969).

Although from time to time measures have been advanced to provide for compulsion and anti-strike laws, the RLA has served as the basis for labor management harmony and industrial peace in the railroad industry. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.,* 394 U.S. 369, 379 (1969). The choice made by Congress consistently has been to favor collective bargaining, which is conceived necessary to the long-term maintenance of industrial peace in the railroad sector.

In *Order of Railroad Telegraphers v. Chicago & N.W. Ry.,* 362 U.S. 330 (1960), this Court was confronted with

a somewhat similar situation. That decision arose out of the filings by the carrier with state public utility commissions to eliminate various stations, which would have resulted in loss of jobs for some station agents and telegraphers. The carrier refused to negotiate with the union on the ground that the request did not raise a bargainable issue under the Railway Labor Act and that the state commissions had the power to determine whether station agencies could be discontinued, which power could not be evaded by entering into a bargaining agreement. This Court found the legislative history and language of the legislation revealed a non-interventionist policy in labor disputes in order to promote freedom of association, organization, representation and negotiation on the part of workers. *Id.*, 336. Rejecting the argument that employees have "no collective voice to influence railroads to act in a way that will preserve [their] interests" (*id.*, 338), the Court opined that both the "Railway Labor Act and the Interstate Commerce Act recognized that stable and fair terms and conditions of railroad employment are essential to a well-functioning national transportation system." *Id.*, 337.

With respect to the same issue now raised by the ICC's decision herein, the Court rejected the concept that the Interstate Commerce Act abrogates the right of the carrier's employees to negotiate on job security and stability:

> It would stretch credulity too far to say that the Railway Labor Act, designed to protect railroad workers, was somehow violated by the union acting precisely in accordance with that Act's purpose to obtain stability and permanence in employment for workers. There is no express provision of law, and

> certainly we can infer none from the Interstate Commerce Act, making it unlawful for unions to want to discuss with railroads actions that may vitally and adversely affect the security, seniority and stability of railroad jobs.

Id., 339-340.

In response to the carriers' argument that negotiations and possibly continued operation of service and lines would be wasteful and contrary to the policy expressed in the Interstate Commerce Act to foster an efficient national railroad system, the Court said that "Congress has acted on the assumption that collective bargaining by employees will also foster an efficient national railroad service." *Id.*, 342.

Moreover, the Fifth Circuit has clearly held that the term "transaction" used in 49 U.S.C. §§ 11341(a) and 11343(a) is for exemption purposes limited to the transfer of the right to DRGW and MKT trains to use certain MP and UP lines and does not extend to the subject of the employees manning those trains. In *Texas & N.O. R.R. v. Brotherhood of Railroad Trainmen,* 307 F.2d 151 (5th Cir. 1962), that Court of Appeals in examining this question concluded that the immunity granted by what is now section 11341(a) did not extend to those proposals before the ICC which dealt with the applicant carrier's intentions concerning rail labor. In so holding, the court relied upon the terms of the statute and upon prior Commission interpretations of its authority. *See also City of Palestine v. United States,* 559 F.2d 408 (5th Cir. 1977), *cert. denied,* 435 U.S. 950 (1978), which held that the Commission may nullify state law only when its restraints absolutely prohibit a consolidation.

These cases establish that the Commission has not been given a license to eliminate contracts and to relieve rail carriers from their collective bargaining obligations. This callous and cavalier disregard of the employment and seniority rights of the employees of the owning railroad assuredly has generated labor unrest in the instant case and may very well threaten the success of trackage rights and other future transactions, if the Commission's view is sustained.

Should the Carriers not be relieved from the RLA, any controversy that may arise relative to labor relations matters can nevertheless be adequately handled under the RLA's procedures and, if necessary, as to "the selection of forces from all employees involved" and "any assignment of employees made necessary by the transaction" through the notice, negotiation and arbitration provisions set forth in Article I, Section 4 of the Commission imposed employee protective conditions.

However, as the Second Circuit concluded in *New York Dock Ry. v. United States,* 609 F.2d 83, 101 (2d Cir. 1979):

> . . . [T]he ICC's imposition of these labor protective conditions may place substantial hurdles in the path of rail carrier management seeking to consummate in a smooth and rapid manner transactions covered by 49 U.S.C. §11343-11346. If that proves to be the case, however, the solution would appear to be in an appeal to Congress, rather than to the courts.

Seemingly, the same observation would be applicable to any obstacles the RLA may impose in this case.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.[19]

Respectfully submitted,

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19. In light of the ICC's ruling in the *Southern - Central of Georgia* Case, *supra*, and its consistent disclaimer of jurisdiction in crew manning matters, as well as the fact that crew selection on its face is not a necessary facet of nor an impediment to a trackage rights transaction, remand to the ICC would not be appropriate. BLE, therefore, suggests that the parties be left to their remedies under the RLA, as the court below decided in its initial opinion, or, insofar as selection and assignment of work forces to the ICC imposed employee protective conditions.

APPENDIX A

Decision in Santa Fe Southern Pacific Corporation - Control - Southern Pacific Transportation Company

INTERSTATE COMMERCE COMMISSION
DECISION NO. 21

Finance Docket No. 30400[1]

SANTA FE SOUTHERN PACIFIC CORPORATION - CONTROL - SOUTHERN PACIFIC TRANSPORTATION COMPANY

Decided: December 9, 1985

By emergency petition for extraordinary relief filed October 31, 1985, the Atchison, Topeka and Santa Fe Railway Company (ATSF), Southern Pacific Transportation Company (SPT), and Santa Fe Southern Pacific Corporation (SFSP), (the railroads), seek an order authorizing ATSF and SPT to compel rail labor unions to enter into negotiations, and ultimately binding arbitration, concerning implementation of rail employee protective conditions. These negotiations would be conducted in anticipation of possible approval of the consolidations that are presently being considered by the Commission. While not asking the Commission to determine, at this time, whether to approve the merger, or what level of employee protection will be imposed if approved, applicants seek a determination concerning the appropriate procedures for resolving any disputes that may arise in connection with negotiating changes in labor agreements necessary to implement the transactions if approved. This would involve prescribing procedures, under 49 U.S.C. 11341, so as to displace the procedures established under any contrary provisions of

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1. Embraces Finance Docket No. 30400 (Sub-Nos. 1-20 and MC-F-15628).

the Railway Labor Act, 45 U.S.C. 151 *et seq.* (RLA). The Railway Labor Executives' Association (RLEA) has replied. The railroads filed a petition for leave to file a reply to RLEA's reply. The railroads simultaneously filed a reply. The petition for leave to file a reply is granted and the reply is accepted into the record.

As pertinent here, RLEA argues that in order to make the findings necessary to remove the entire transaction from the RLA at this time, the Commission must prejudge the merits of the consolidation and alter prior labor agreements. It is suggested that seniority and other rights of rail employees will be ignored or subjected to unilateral changes as the result of imposing, at this time, the procedures set out in *New York Dock Ry - Control - Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979). The unions request oral argument.

The petition presents two issues—whether we have the authority to grant the relief and, if so, whether we should do so. Applicants have not persuaded us on either basis that we could or should supercede RLA and alter existing labor agreements in advance of a decision on the merits of this case or a determination of the level of employee protection that may be imposed if the merger is approved. The decision in *Southern Ry. — Purchase — Kentucky & Indiana Terminal R.R.*, F.D. No. 29690, served March 3, 1982 (unpublished), (K&ITR), does not support applicants' request. There we declined to get involved in the collective bargaining process by enjoining, at the request of rail labor, negotiations that were proceeding under the *New York Dock* conditions. Here we are again being asked to affirmatively become involved in the collective bargaining process by mandating negotiations and, if necessary, binding arbitration and we similarly decline to do so. Therefore, we will deny the petition.

APPENDIX B

Decision in Lackawanna County Railroad Authority, Inc. - Exemption From Regulation

INTERSTATE COMMERCE COMMISSION
DECISION

Finance Docket No. 30628

LACKAWANNA COUNTY RAILROAD AUTHORITY, INC. - EXEMPTION FROM REGULATION

Decided: January 24, 1986

We are denying the petitions to reopen filed by the Pennsylvania State Legislative Board-United Transportation Union (UTU), the Brotherhood of Locomotive Engineers (BLE), and the Brotherhood of Maintenance of Way Employees (BMWE).

In a decision served on March 22, 1985,[1] we exempted the Lackawanna County Railroad Authority, Inc. (LCRA) from 49 U.S.C. Subtitle IV. That exemption also covered LCRA's: (a) acquisition of the following lines from the Delaware and Hudson Railway Corporation (D&H) in Lackawanna County, PA: (1) a portion of the Carbondale Branch between MP 196.8 in the Borough of Moosic and MP 174.59 in the Township of Fell, a distance of 22.21 miles; and (2) the 1.2-mile Vine Street Branch; and (b) acquisition of incidental trackage rights over D&H between MP 130.4 at Minooka Junction and MP 133.8 at Bloom Junction. We also exempted Lackawanna Valley Railroad Corporation (LVRC) from the prior approval requirements of 49 U.S.C. 10901 to operate the above-described lines.

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1. 50 Fed. Reg. 11950 (March 26, 1985).

PRELIMINARY MATTERS

BLE moves for leave to late-file a petition to join in UTU's petition to reopen. LCRA, LVRC, and D&H jointly move to strike BLE's motion on the grounds that the decision served March 22, 1985 is administratively final as to BLE, and that BLE has not shown material error, new evidence, or substantially changed circumstances to justify reopening. However, our rules of practice are to be construed liberally (49 C.F.R. 1100.3), and we find that BLE's petition does not broaden the issues raised in UTU's petition. Accordingly, BLE's motion for leave to late-file is granted, and the motion to strike is denied.

BLE replied to the motion to strike, arguing that equitable considerations relating to a wage deferral agreement between labor and D&H preclude transfer of a D&H line without imposition of labor protective conditions. D&H, LCRA, and LVRC responded to BLE's arguments and move to strike them on the grounds that some are redundant and the above argument broadens the issues. Since those carriers have been able to respond and thus have not been prejudiced, we will deny their motion to strike.

On July 11, 1985, BMWE late-filed a letter-petition stating that it endorses UTU's and BLE's petitions to reopen. It also attached a brief verified statement, to which D&H, LCRA, and LVRC replied. Although BMWE's filing is late, and we admonish it to act promptly in the future or its pleadings will be rejected, we will accept its petition since it relies primarily on the record already made and D&H, LCRA, and LVRC have been able to respond to it.

BACKGROUND

LCRA, a noncarrier municipal corporation, entered an agreement with D&H to acquire the two line segments and trackage rights. It plans to rehabilitate the lines, but will not hold itself out as an operator. Instead, operations will be performed by LVRC.

UTU, BLE, and BMWE have petitioned to reopen because we did not impose employee protection conditions on D&H when we granted the exemptions. D&H embargoed the northern 16-mile segment in December 1983 because of poor track conditions. It operated over the southern 7-mile portion on an "as needed" basis, which was usually two or three times a week. D&H did not file an abandonment application.

DISCUSSION AND CONCLUSIONS

Petitioners first argue that we should dismiss the exemption petitions because the purchase and operating agreements are not in evidence. However, detailed proof for exemptions is neither required by 49 U.S.C. 10505 nor by our exemption procedures. Ex Parte No. 400, *Modification of Procedure For Handling Exemptions Filed Under 49 U.S.C. 10505,* (not printed), served December 29, 1980.

Petitioners next argue that LVRC's operation of LCRA's line is governed by 49 U.S.C. 11343, because exemption from that section was the relief they requested. We determine which statute governs our deliberations based on an analysis of the actual nature of the transaction. Neither LVRC nor LCRA were carriers when they filed the exemption. Section 11343 is applicable only to transactions where both the buyer and seller of rail property are carriers. *Application Proc. - Construct, Acq. or Oper. R. Lines,* 365 I.C.C. 516, 518 (1982). Section

10901, however, governs rail entry and the creation of new carriers. Since LVRC and LCRA are new carriers, section 10901 would govern this transaction, if it had not been exempted, not section 11343.

Petitioners also contend that we erred in finding that the proposed trackage rights are *de minimis* and purely incidental to the section 10901 acquisition. However, the proposed trackage rights are only 4 miles in length and in concert with the acquisitions constitute a single, new, integrated operating proposal. Since the trackage rights transaction is contemporaneous with and incidental to the section 10901 acquisition, it also falls within section 10901. *See* Finance Docket No. 30505, *Alabama So. R.R. Co. and the Alabama Great S. R.R. Co. - Acqs. Opers. and Trackage Rts. - Exemption,* ..... I.C.C. 2d. ..... (1984).

Petitioners further contend that D&H desires to abandon the involved lines and that it cannot escape liability for employee protection conditions by selling the lines. UTU cites some cases similar to this proceeding (although they did not involve exemptions) in which we imposed abandonment-type labor protection conditions on vendors of the involved lines. Contrary to its assertion, however, imposition of such conditions was discretionary, not mandatory. *See Knox & Kane R. Co. — Petition for Exemption,* 366 I.C.C. 439, 443 (1982) (*Knox*).

Petitioners' assertion that section 10903 governs D&H's discontinuance of its operations is incorrect. We have uniformly held that noncarrier acquisition of a rail line is governed by section 10901. *Application Proc. — Construc. Acq. or Oper. R. Lines,* 365 I.C.C. 516 (1982). This policy has been applied consistently in granting exemption from the requirements of 49 U.S.C. 10901 where the pro-

posed transaction would result in the transfer of a rail line slated for abandonment by a carrier to a noncarrier proposing to continue rail operations. *See, e.g.,* Finance Docket No. 30462, *Burlington, C.R. & N. Ry. Co. — Exemption* (not printed), served May 21, 1984, and Finance Docket No. 30431, *Minnesota Valley Transportation Co., Inc. — Southwest — Temporary Exemption* (not printed), served March 16, 1984). The Commission's holding that a certificate of abandonment is not required when a railroad contemplating abandonment sells its line to a noncarrier has been sustained in *Illinois v. United States,* 604 F.2d 519 (7th Cir. 1979); *In re Chicago, Milwaukee, St. Paul & Pacific R.R. Co.,* 658 F. 2nd 1149, 1164, 1169 (7th Cir. 1981), *cert. denied,* 445 U.S. 1000 (1982); and *Railway Labor Executives' Assn. v. United States,* 697 F. 2nd 285 (10th Cir. 1983).

Petitioners also argue that *Smith v. Hoboken R. Co.,* 328 U.S. 123 (1946) (*Smith*) requires D&H to abandon its line before LCRA can acquire it. This is an improper reading of *Smith. Smith* was decided under section 77 of the Bankruptcy Act, not the Interstate Commerce Act. More importantly, *Smith* involved an involuntary lease forfeiture situation, not a voluntary sale.

UTU is also incorrect in claiming that the only instances where the Commission has permitted a carrier to transfer its line to another person without imposition of employee conditions involve "entire line" abandonments. *Knox, supra,* for example, which involved acquisition of track from the Baltimore and Ohio Railroad Company, did not involve an entire line abandonment. Furthermore, in that decision, at 443-444, we stated several reasons why imposition of protective conditions on vendors may have effects contrary to objectives of the rail trans-

portation policy. We concluded that "although the imposition of the *Oregon III* conditions on a vendor may at times be justified, there are counte-vailing considerations which dictate that this policy not be reflexively applied." No showing justifying the imposition of labor protective conditions has been made.

BMWE alleges that five D&H employees have already been adversely affected by a change in the location of the headquarters to which they report. It notes that, prior to the sale of the Carbondale Branch, D&H closed its facilities at Carbondale, Green Ridge, and Wyoming Avenue in anticipation of the sale. It predicts that additional employees will be displaced or furloughed due to the sale unless labor protective conditions are imposed on D&H. The carriers reply that BMWE's allegations are unsubstantiated and that it waited so long to submit its views that it requests retroactive application of labor protection on a consummated transaction.

The facts BMWE has outlined are similar to those in *Knox, supra*. In *Knox* a number of employees were adversely affected by the transaction. However, the Commission found that the rail transportation policy considerations concerning fair wages and safe and suitable working conditions in the industry were outweighed by policy objectives to foster sound economic conditions in transportation and to ensure the development and continuation of a sound rail transportation system. We reach the same conclusion here and will not impose protective conditions on D&H based on BMWE's arguments.

BLE argues that equity demands the imposition of protective conditions because D&H and 21 labor organizations, including BLE, signed a still-effective 12 percent wage deferral agreement as a means of D&H reaching self

sufficiency. One of the considerations in this agreement was the creation of job stability for the D&H employees who gave up 12 percent of their wages. BLE quotes Item 11 of its agreement in which D&H:

> [A]grees to maintain a rigid observance of all existing contract provisions relating to the transfer of work to other D&H work sites *or to other rail companies,* particularly those owned or sought to be owned by GTI. (Emphasis added).

BLE contends that the agreement commits D&H to using its employees to serve those lines transferred to another, and that D&H can change its commitment only by serving notice under section 6 of the Railway Labor Act and negotiating a change. BLE further argues that the Commission may not, through the exemption process, relieve D&H of its commitment, and that failure to grant D&H's employees protection based on D&H's contractual representation to them would constitute an abuse of discretion.

D&H, LCRA, and LVRC reply that this is an issue beyond the Commission's jurisdiction because it involves disputes as to the interpretation of labor agreements that should be resolved pursuant to their provisions and the Railway Labor Act. They also contend that sale of a rail line does not constitute farming out or transfer of work.

Whether or not the agreement between D&H and its employees is a matter that applies to these transactions is outside of our jurisdiction. Therefore, our refusal to impose labor protection, in the face of this agreement is not an abuse of discretion, and would not resolve any conflict [sic] it.

The prior decision inadvertently failed to exempt LVRC from the prior approval requirements of 49 U.S.C. 11301 to permit it to issue $50,000 in common stock to provide initial working capital, although such an exemption was clearly intended by the discussion in the decision. Accordingly, we will revise the second ordering paragraph in our prior decision to exempt the stock issuance.

We conclude that the petitions for reopening should be denied, and that employee protective conditions are not required.

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. BLE's and BMWE's motions for leave to join in UTU's petition are granted.

2. The motions of LCRA, LVRC and D&H to strike are denied.

3. Ordering paragraph number 2 in the prior decision is revised to read:

> 2. Lackawanna Valley Railroad Corporation is exempted from the prior approval requirements of (a) 49 U.S.C. 10901 to operate the line, and (b) 49 U.S.C. 11301 to issue $50,000 in common stock.

4. The petitions to reopen are denied.

5. This decision is effective on the date served.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Sterrett, Andre and Lam-

boley. Commissioner Lamboley concurred with a separate expression.

JAMES H. BAYNE
(SEAL) Secretary

COMMISSIONER LAMBOLEY, concurring:

Although I concur in the result, I do not share the majority's discussion and conclusion on certain issues.

First, I continue to believe that as structured, the trackage rights, while an integral part of the transaction, are more properly encompassed by § 11343. § 11343 and § 10901 are compatible and not to be construed as mutually exclusive. See *People of Ill. v. I.C.C.*, 604 F.2d 519 (7th Cir. 1979).

Second, the decision fails to adequately discuss the common carrier obligations in relation to the purchase of the *active*, rail line. The majority terms both LVRC and LCRA as new carriers, yet the original decision notes only that LVRC assumes the common carrier obligation.

The decisions are silent and potentially confusing as to whether LCRA may have any common carrier obligation, notwithstanding LVRC's current assumption of obligation.[1]

Third, the decision fails to review the issue whether, for purposes of considering labor protection criteria and

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1. This issue seems squarely raised by (1) the fact LCVA requested exemption from such obligation, and (2) the protestants' arguments on reopening assume that LCRA was not so exempted, and does in fact have a common carrier obligation. Certainly those who are economically interested in and support continued rail service should not be left without Commission clarification of this issue.

the seller's status, there is a conceptual distinction between transactions involving sale of an active rail line and abandonment.[2]

Finally, it is appropriate to point out that meaningful review of labor protection issues are frequently hindered, as here, by the lack of an adequate presentation of specific factual evidence concerning dislocation and economic impact. General conclusionary allegations are simply not sufficient.

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2. This issue, although suggested by the cited Commission's discussion in *Knox & Kane Railroad Co. - Gettysburg Railroad Co. - Petition for Exemption,* 366 I.C.C. 439 (1982) is not reviewed in that case nor in our recent decision in Ex Parte No. 392 (Sub-No. 1), *Class Exemption for the Acquisition and Operation of Rail Lines under 49 U.S.C. § 10901,* I.C.C. 2d (served January 15, 1986).

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QUESTIONS PRESENTED

1. Does the Interstate Commerce Commission have the power under 49 U.S.C. § 11341(a) to relieve a railroad of its obligations to employees under 49 U.S.C. § 11347, including a railroad's obligations to continue collective bargaining rights?

2. If the answer to the first question is in the affirmative, may the ICC relieve a carrier participating in an approved consolidation transaction of its obligations to its employees under the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, without first supplying specific findings to support its decision that such an exemption is necessary?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-792

INTERSTATE COMMERCE COMMISSION,
Petitioner,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *et al.*,
Respondents.

No. 85-793

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
Petitioner,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT UNITED TRANSPORTATION UNION

On November 7, 1985, petitioners Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] and Missouri-Kansas-Texas Railroad Company [hereinafter, "MKT"] filed separate timely petitions with this Court for the issuance of writs of certiorari to the United States Court of

Appeals for the District of Columbia Circuit to review a decision by a divided panel of that court in *Brotherhood of Locomotive Engineers v. ICC*, 761 F.2d 714 (D.C. Cir. 1985), which vacated and remanded orders of the ICC in which the Commission concluded that an earlier ICC order had relieved several railroads of whatever statutory or contractual obligations they may have had to allow employees to participate in the selection of forces to perform certain trackage rights operations. On March 24, 1986, this Court granted the ICC's and MKT's petitions, and this review proceeding has followed.[1]

COUNTERSTATEMENT OF THE CASE

In October 1982, petitioner ICC issued a decision of almost two hundred pages with an additional one hundred and sixty-three pages of appendices approving the Union Pacific Corporation's request to create the Pacific Rail System, a holding company which would control the Missouri Pacific, Union Pacific and Western Pacific railroads. *Union Pacific Corp.—Control*, 366 I.C.C. 459 (1982), *aff'd in part, remanded in part sub nom. Southern Pacific Transportation Co. v. ICC*, 736 F.2d 708 (D.C. Cir. 1978), *cert. denied*, 105 S.Ct. 1171 (1985). Two months later, the applicants exercised that authority and formed a single rail system which operates over 22,000 miles of rail "connecting the Pacific Northwest, northern and southern California through the central corridor with the Midwest (including all major mid-continent east-west gateways), Mississippi River ports, Gulf Coast ports, and Texas-Mexico border crossing points." *Id.* at 474. That ICC approval, however, was not unlimited, for the Commission imposed two forms of conditions on its approval—*i.e.*, grant of trackage rights to competitors, and the imposition of employee protective provisions. It is the interaction of those conditions which has led to this proceeding.

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[1] Respondents Brotherhood of Locomotive Engineers and United Transportation Union [hereinafter, "BLE" and "UTU," respectively] filed cross-petitions for writs of certiorari to review the underlying issue of whether an ICC order can ever be viewed as superseding Railway Labor Act or employee contractual obligations. Sup. Ct. Nos. 85-983 and 85-997. Those petitions are still pending.

After concluding that the proposed Pacific Rail System would pose anti-competitive problems in at least three geographical areas, the ICC believed that it could redress those anti-competitive concerns by granting a competitor in each geographical area access to the market in which adequate competition was threatened. 366 I.C.C. at 589. To accomplish this, the Commission imposed as a condition of its approval of the main control application the requirement that the primary applicants (*i.e.*, the Missouri Pacific and Union Pacific railroads) give several railroads trackage rights[2] over their lines to enable those competing railroads to serve the threatened markets. As relevant to this case, the Commission required the Missouri Pacific and Union Pacific to give the MKT trackage rights over approximately 200 miles of track from Kansas City, Missouri to Council Bluffs, Iowa.[3] 366 I.C.C. at 570. Another railroad, the Denver & Rio Grande Western Railroad [hereinafter, "D&RGW"] was to be given trackage rights over 619 miles of Missouri Pacific track from Pueblo, Colorado to Kansas City, Missouri. 366 I.C.C. at 572.[4] In both cases, neither the MKT nor the D&RGW had operated directly into

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[2] Trackage rights, as the D.C. Circuit explained, "give one railroad the right to run its trains over another railroad's tracks." Appendix to ICC Petition [hereinafter, "ICC App."] at 7a n.2. Petitioner MKT (MKT Br. at 12 n.7) and the railroads participating as *amici* (*Amici* Br. 3 n.3) assert that it is standard industry practice for a trackage rights tenant to use its own power and crews. While respondent UTU agrees that this is true for "bridge" trackage rights—*i.e.*, trackage rights giving the tenant carrier the ability to bypass its own line to move the same traffic which it had previously moved—respondent has challenged this statement of industry practice for trackage rights which, as here, entail an extension of the tenant's operations into the landlord's markets to haul traffic previously moved by the landlord. This factual dispute was raised in *Missouri Pacific R.R. v. UTU*, E.D. Mo. Civil Action No. 83-771-C(1) (*see*, Sup. Ct. No. 85-1054), but was not resolved by the district court.

[3] Those trackage rights extended from Kansas City, Missouri to Omaha, Nebraska and from Union to Lincoln, Nebraska on the Missouri Pacific; Union Pacific tracks were involved from Omaha to Council Bluffs.

[4] A third carrier, the St. Louis Southwestern Railway, was granted trackage rights over the Missouri Pacific between Kansas City and St. Louis. Those rights duplicated the tenant's existing right to operate between those two points, albeit on a line which it acquired from another carrier in 1980. *See*, 366 I.C.C. at 585. The St. Louis Southwestern's implementation of those trackage rights is not at issue in this case.

those markets prior to the ICC's order, but, rather, had participated in the movement of the traffic generated from those markets by interchanging with the Missouri Pacific at Kansas City for the MKT and at Pueblo for the D&RGW. Consequently, as a result of the trackage rights conditions, MKT and D&RGW were to be given the right to haul traffic over Missouri Pacific tracks which, prior to this authorization, was transported by Missouri Pacific train crews over those same rail lines. Those grants of trackage rights authority, according to the Commission, were necessary "in order to preserve the competitive balance in transportation markets where competition might otherwise be significantly lessened as a result of the consolidations." 366 I.C.C. at 589.

Since the Missouri Pacific and Union Pacific had opposed the MKT's and D&RGW's trackage rights requests, the parties had not reached an agreement on the terms upon which the trackage rights would be granted, if required by the Commission, and, thus, the Commission did not have written agreements before it when it issued its 1982 Decision. That fact, however, did not preclude the ICC from granting the MKT's and D&RGW's requests, for as the Commission explain .d (366 I.C.C at 589):

> No agreements have been reached between the parties regarding the trackage rights for which we have found a need. We prefer that the parties set the terms of their trackage rights agreements wherever possible, and then seek our approval as required, 49 U.S.C. 11343. In the event the parties should be unable to reach agreement, we will set the terms for the trackage rights.

In order to give the railroads time for meaningful negotiations, the ICC stated that it would not entertain petitions requesting the Commission to set the trackage rights terms until at least 60 days after the effective date of the decision—*i.e.*, 60 days after November 19, 1982. 366 I.C.C. at 590. Nevertheless, the lack of specific terms was not to delay the implementation of trackage rights, for the Commission noted that: "[I]mmediately upon consummation of the consolidations, the imposed trackage rights will become effective and trackage

rights tenants will have authority to commence operations." *Id.* This was so even though one of the most "material" terms of a trackage rights arrangement—compensation—had not been set. This fact, however, did not preclude implementation, for the ICC added that: "Compensation, which will accrue from the actual date of the start of trackage rights operations, will be payable after terms have been determined." *Id.*

Compensation was not the only term left unresolved, for the Commission recognized in its decision that petitioner MKT's proposed operations "may require some revision." 366 I.C.C. at 569. For example, the ICC noted that the MKT's plan to use one crew to operate the 200 route miles "appears unrealistic." *Id.* But that was immaterial, for as the ICC explained (*id.*):

> If MKT cannot perform the proposed operations using only one crew, then it should be able to revise its plan to provide for service using two crews, with the crew change occurring at an appropriate point between Kansas City and Omaha. Although operations using two crews would be more costly than using one crew, such operations appear feasible and would prevent operating problems relating to hours of service laws [*i.e.*, federal law which limits train crews to twelve hours of continuous service with prescribed rest periods thereafter, 45 U.S.C. § 62].

Trackage rights were not the only form of conditions imposed by the ICC on its approval of the control application, for the Commission, in compliance with 49 U.S.C. § 11347, required the primary applicants and the trackage rights tenants to provide fair arrangements to protect the interests of employees who may be affected by the various transactions approved by the ICC.[5] First, the Commission provided that its control and coordination authority granted to Missouri Pacific, Union

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[5] Certain rail labor organizations, including petitioner UTU, challenged whether the ICC had complied with 49 U.S.C. § 11347 in issuing its 1982 Decision because the ICC refused in that order to protect employees of nonapplicant carriers who might be affected by the control approval. 366 I.C.C. at 621. That challenge was rejected by the Court of Appeals for the

(footnote continues)

Pacific and Western Pacific was "subject to the conditions for the protection of employees enunciated in *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979)," *aff'd, New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979). 366 I.C.C. at 654, ¶ 17. And second, the ICC stated in its order that: "The trackage rights authority granted [to MKT and D&RGW, among others] . . . are subject to the imposition of the employee protective conditions to the extent specified in *Norfolk and Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified by *Mendocino Coast Ry., Inc.—Lease and Operate*, 360 I.C.C. 653, 654 (1980) [*aff'd, Railway Labor Executives' Assoc. v. United States*, 675 F.2d 1248 (D.C. Cir. 1982)]." 366 I.C.C. at 654, ¶ 19.

Both sets of employee protective conditions (*i.e.*, the *New York Dock* and *Norfolk and Western* conditions) [6] require that the rail carriers upon whom those obligations were imposed preserve all "rules, working conditions and all collective bargaining and other rights, privileges and benefits . . . of railroads' employees under applicable laws and/or existing collective bargaining agreements or otherwise . . . ." *E.g., Norfolk & Western* conditions, Art. 1, § 2, 354 I.C.C. at 610; [7] *see also,*

(footnote continued)

District of Columbia Circuit in *Southern Pac. Transp. Co. v. ICC, supra*, 736 F.2d at 725. This Court denied the petition by those labor organizations, including the UTU, for a writ of certiorari to review the court of appeals' decision. *BMWE v. United States*, Sup. Ct. No. 84-641.

[6] According to the Commission, the *New York Dock* conditions are the minimum levels of employee protection required by 49 U.S.C. § 11347 to be imposed in control, merger or purchase cases, whereas the *Norfolk & Western* conditions are the minimum levels to be imposed in trackage rights cases. *See*, 366 I.C.C. at 620, 622. While the monetary benefits provided by both sets of conditions are identical, their principal difference lies in their provisions requiring advance notice and negotiation before the carriers may implement a "transaction" which may adversely affect employees. *See*, note 8, *infra* at p. 7.

[7] Art. 1, § 2, of the *Norfolk & Western* conditions provides (354 I.C.C. at 610):

> The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including

(footnote continues)

New York Dock conditions, Art. 1, § 2, 360 I.C.C. at 84. Moreover, both sets of conditions provide that any carrier upon whom the conditions are imposed which contemplates consummating a "transaction" (*e.g.*, trackage rights under the *Norfolk & Western* conditions), must give advance notice of such a transaction to all "interested employees" and to their employee representatives, and must, if required, negotiate an implementing agreement to provide for, among other matters, "the selection of forces from all employees involved on basis accepted as appropriate for application in the particular case . . . ." *Norfolk & Western* conditions, Art. 1, § 4, 354 I.C.C. at 610; *New York Dock* conditions, Art. 1, § 4, 360 I.C.C. at 85. Both sets of conditions are virtually identical on this point and provide as follows:

> Each transaction which will result in a dismissal or displacement of employees or or rearrangement of forces, shall provide for the selection of forces from all employees involved on basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4.

Norfolk & Western conditions, Art. 1, § 4, 354 I.C.C. at 610-11; *New York Dock* conditions, Art. 1, § 4, 360 I.C.C. at 85.[8]

(footnote continued)

> continuation of pension rights and benefits) of railroads' employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

[8] A difference between the two sets of conditions is that the *Norfolk & Western* conditions uses the word "will" in the first line quoted above, whereas the *New York Dock* conditions uses the term "may." The main substantive differences between the notice and negotiation provisions in the two sets of conditions, however, concerns the length of the advance notice (*i.e.*, 90 versus 20 days) and the fact that the *New York Dock* conditions prohibits the consummation of a transaction until an implementing agreement is reached whereas the *Norfolk & Western* conditions does not prohibit the consummation of the transaction at the end of the 20 days notice period even though the parties are still negotiating an implementing agreemeent. *See, Railway Labor Executives' Assoc. v. United States, supra*, 675 F.2d at 1253.

The dispute which has finally reached this Court has resulted from rail labor's attempts to enforce the requirements in both sets of conditions that the railroads preserve collective bargaining rights (*i.e.*, Art. 1, § 2) and that they give rail labor a voice in the crew selection process (*i.e.*, Art. 1, § 4). Petitioner MKT and the other involved railroads, along with the ICC, on the other hand, assert that those protective provisions must be viewed in light of the specific "transaction" approved by the Commission and, to the extent "that existing working conditions and collective bargaining agreements conflict with a transaction which [the ICC has] . . . approved, those conditions and agreements must give way to the implementation of the transaction." ICC Decision of October 25, 1983 at 6; ICC App. at 60a. This conflict arises in this case because both the MKT and the D&RGW submitted proposed operating plans in support of their trackage rights requests and included in those plans assumptions as to the manner in which they would staff the trackage rights operations; petitioners assert that those assumptions now control over conflicting provisions in either the employee protective conditions or the Railway Labor Act, 45 U.S.C. § 151, *et seq.*

In its application for trackage rights, petitioner MKT proposed using its own employees to perform its trackage rights operations over the Missouri Pacific and Union Pacific tracks and submitted a proposed agreement which provided that MKT "with its own employees, and its sole cost and expense, shall operate its engines, cars and trains on and along Joint Track." ICC Decision of October 25, 1983 at 8; ICC App. at 62a. D&RGW, however, was not so emphatic and stated in its application that it " 'may, at its option, elect to employ its own crews for the movement of its trains, locomotives and cars' " over Missouri Pacific tracks. *Id.* at 9 quoting D&RGW application; ICC App. at 62a. During the hearings on their proposed trackage rights, counsel for the Union Pacific and Missouri Pacific questioned a D&RGW witness on that carrier's crew proposal; that witness explained that " 'as these trackage rights are granted to us we are willing to sit down and work out any kind of arrangement you [UP-MP] want . . . .' " ICC Decision of October 25, 1983, at 10, quoting Transcript of June 23, 1981 hearing; ICC App. at 63a.

Contrary to petitioners' allegations (ICC Br. at 7-9; MKT Br. at 4) rail labor, including respondent UTU, did not sit idly by while the ICC was considering the contingent trackage rights applications. Respondent UTU was one of five (5) unions which participated as a protestant to the MKT and D & RGW trackage rights requests. *See,* 366 I.C.C. at 482; Joint Appendix to Court of Appeals [hereinafter, "J.A."] at ii (No. 15) and ix (No. 10). In their comments in opposition to the trackage rights applications of MKT and D&RGW, respondent UTU and the four (4) other labor organizations stated that the proposed trackage rights would "clearly have an effect upon employees." *E.g.,* Comments of Brotherhood of Maintenance of Way Employes, *et al.,* Finance Docket No. 30,000 (Sub-Nos. 20-33) at 2 (Certified Index No. 10 at J.A. ix). Respondent UTU and the other labor organizations stated further that:

> Consequently, the above labor organizations submit, this Commission must consider the interests of employees in passing upon the merits of this transaction, and must, if it approves this application, condition that approval by imposing a fair and equitable arrangement to protect the interests of employees who may be affected thereby.

Id. at 2-3. An identical position was taken by the UTU concerning the D&RGW's application (Comments of Brotherhood of Maintenance of Way Employes, *et al.,* Finance Docket No. 30,000 (Sub-No. 18) at 2-3 (Certified Index No. 15 at J.A. ii)), and in both cases respondent UTU requested the imposition of employee protective conditions which required, among other things, the preservation of collective bargaining rights, advance notice of the transaction, and the negotiation of an implementing agreement to provide for "the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case . . . ." *Id.* at Exhibit A, page 4. The substance of those requests were granted. 366 I.C.C at 654, ¶ 19.

When it approved the control application and imposed the MKT and D&RGW trackage rights as a condition of that

approval, the ICC did not expressly address, or suggest by implication, that the trackage rights applicants' crewing proposals were "material" terms of the trackage rights authority. On the other hand, the ICC's order provided that the grant of trackage rights authority to MKT and D&RGW was approved, but only "to the extent and under terms and conditions discussed in the decision" (366 I.C.C. at 654, ¶ 14), one such condition being that the trackage rights tenants' must agree to abide by the *Norfolk & Western* conditions. As the court of appeals remarked, therein "lies the nub of this case," for from all appearances, the ICC's imposition of employee protection qualified its approval of the crew selection proposals, rather than the reverse. ICC App. at 13a n.3.

A. MKT's and D&RGW's Trackage Rights Operations

Shortly after the control authority was consummated on December 22, 1982, the Missouri Pacific sent a letter on December 31, 1982, to various representatives of its employees, including respondent UTU, informing rail labor that the MKT and D&RGW would commence trackage rights operations over the Missouri Pacific in the near future; according to that letter, the MKT would commence its operations on or about January 3, 1983. *Missouri Pacific R.R. v. UTU*, E.D. Mo. Civil Action No. 83 771(c)(1), Memorandum Decision, reproduced as Addendum A to ICC Petition [hereinafter, "ICC Pet."] at 6a. Respondent UTU asked the Missouri Pacific to negotiate with it over the impact of those trackage rights operations on Missouri Pacific employees and over the transfer to MKT of the right to operate on Missouri Pacific tracks. ICC Pet. at 9a. Missouri Pacific refused to negotiate on either subject because, in its opinion, the ICC's October 1982 decision required it to grant trackage rights to MKT and it, therefore, had no right to negotiate about either the selection of forces to staff MKT's operations over its tracks, or other aspects of the impact of that transfer of operating rights on Missouri Pacific employees represented by the UTU. J.A. at 125-26. As the Missouri Pacific subsequently explained, "it would be inappropriate and unproductive" for it to bargain with the UTU because it had no

ability "to bind" MKT or D&RGW "to an agreement regarding selection of forces." *Id.*[9]

Petitioner MKT commenced operations over the Missouri Pacific's and Union Pacific's lines on January 6, 1983, using its own employees. Respondent D&RGW also commenced operations over the Missouri Pacific lines but, unlike MKT, used and is still using Missouri Pacific employees to perform those operations. J.A. at 74-75.

After unsuccessfully requesting the Missouri Pacific to bargain with it over the trackage rights operations by MKT, respondent UTU informed the Missouri Pacific that the employees which it represented on that carrier would withdraw their service at 12:01 a.m. on April 4, 1983. J.A. at 74. Respondent Missouri Pacific sought and obtained on March 30, 1983, a Temporary Restraining Order enjoining any strike by petitioner over this dispute. J.A. at 75. That interlocutory injunction was made permanent in 1984, and was subsequently affirmed by the United States Court of Appeals for the Eighth Circuit. *Missouri Pacific R.R. v. UTU*, 782 F.2d 107 (8th Cir. 1986), *pet. for cert. pending*, Sup. Ct. No. 85-1054.

B. Proceedings Before The ICC

Respondent BLE reacted differently to the carriers' refusal to negotiate over the crew selection issue and on April 4, 1983, it asked the ICC to clarify the prior order approving the control application. Respondent BLE asserted in its petition for clarification that the October 1982 decision did not mandate the use of MKT or D&RGW crews, but, rather, left the crew selection issue to be resolved under the procedures of the

[9] On June 16, 1983, respondent UTU asked all carriers involved in this case to negotiate implementing agreements under Article 1, Section 4 of the employee protective provisions to provide for a mutually agreeable basis upon which all affected employees, including Missouri Pacific employees, would be allowed to participate in the work opportunities presented by the trackage rights operations. J.A. at 122. The Missouri Pacific responded as quoted above, while petitioner MKT responded by asserting that it had negotiated agreements with its own employees, including an agreement with the UTU for MKT employees represented by the UTU, and, thus, it had no obligation under the ICC conditions to negotiate with the UTU over affected Missouri Pacific employees. J.A. at 129-31. D&RGW never responded to the UTU's request. J.A. at 117.

Railway Labor Act, 45 U.S.C. § 151, *et seq.* J.A. at 4. On May 18, 1983, the ICC issued a decision denying the BLE's petition. ICC App. at 51a. According to the Commission, there was no need to clarify its prior order because: "We have broad authority to impose conditions on consolidations and our jurisdiction is plenary." *Id.* at 54a. As the ICC explained: "Inasmuch as DRGW and MKT proposed in their applications that the operations would be performed with their own crews, our approval of the applications authorizes such operations." *Id.*

Respondent BLE, joined by the UTU which filed a separate petition, asked the ICC to reconsider its denial of the petition to clarify, asserting that the ICC did not have the authority to abrogate Railway Labor Act rights and that, even if it did, it had not done so in this case. *E.g.*, J.A. at 71. Those separate requests for reconsideration generated a fifteen (15) page decision by the ICC, served on October 25, 1983, in which the Commission asserted that 49 U.S.C. § 11347 did not limit its powers to abrogate Railway Labor Act obligations (ICC App. at 59a-60a) and that, since its immunity powers under 49 U.S.C. § 11341(a) were "self-executing," its decision automatically operated to relieve the carriers of "any requirements of law that could frustrate implementation of the trackage rights agreement as approved, including the crew assignment provision." *Id.* at 67a-68a.

Respondent UTU had asserted in its petition for reconsideration that Section 11341(a) could not be read as relieving a carrier of its obligations to employees under the Railway Labor Act or collective bargaining agreements because 49 U.S.C. § 11347 required the Commission to impose employee protective conditions which provided that the railroads must preserve those statutory and contractual rights. J.A. at 78-80. That argument was rejected by the Commission because, in the ICC's opinion, the UTU had misjudged the interrelationship between Sections 11341(a) and 11347; according to the Commission (ICC Decision of October 25, 1983, at 6; ICC App. at 59a-60a, emphasis added):

> . . . [S]tandard labor protection conditions generally preserve working conditions and collective

> bargaining agreements. The terms of those conditions, however, must be read in conjunction with our decision authorizing the involved transaction and the underlying statutory scheme. *To the extent that existing working conditions and collective bargaining agreements conflict with a transaction which we have approved, those conditions and agreements must give way to the implementation of the transaction.* The labor conditions imposed under section 11347 preserve conditions and agreements in the context of the authorized transaction.

Respondents BLE and UTU filed separate petitions with the United States Court of Appeals for the District of Columbia Circuit under 28 U.S.C. §§ 2321(a) and 2341, *et seq.*, to review the ICC's decision of October 25, 1983; respondent BLE also asked the court of appeals to review the May 18, 1983 denial of the petition for clarification.

C. Court of Appeals' Decision

On May 3, 1985, a panel of the court of appeals, with one judge dissenting, issued a decision vacating the ICC's decisions. After rejecting an assertion that the unions' petitions to review were untimely because they had not been filed within 60 days of the October 1982 order, the divided panel addressed the unions' challenges to the merits of the ICC's denial of the petition for clarification and concluded that the ICC's 1983 orders should be set aside because the ICC "made no semblance of a showing that the exemption [concerning the crew selection issues] was necessary, as required by the exemption authority section [*i.e.*, 49 U.S.C. § 11341(a)] . . . ." ICC App. at 3a. As the majority stated:

> Congress has given ICC broad powers to immunize transactions from later legal obstacles, but this delegation by Congress is explicitly qualified by a necessity component. The statute thus requires that the exemption authority operate according to necessity, not according to whim or caprice.
>
> This statutory limit on the Commission's authority creates certain responsibilities for ICC. In ex-

> ercising its waiver authority ICC must do more than shake a wand to make a law go away. It must supply a reasoned basis for that exercise of its statutory authority.

Id. at 16a (footnote omitted).

Applying that principle to the case before it, the court observed that "the Commission did not give a shred of reasoning to support its view that completion of the [trackage rights] transactions required shielding crew selection from the Railway Labor Act." ICC App. at 19a (footnote omitted). Consequently, the majority concluded, the ICC "exceeded its authority when it claimed to have waived the Railway Labor Act regarding crew selection." *Id.* at 20a. The court then vacated in their entirety the ICC's decisions on the petition for clarification and the petitions for reconsideration. *Id.* at 21a.

On July 12, 1985, after the ICC had asked the court to reconsider its decision (including that portion of the decision vacating but not remanding), the court *sua sponte* amended its decision to provide that the case was to be remanded to the Commission for proceedings consistent with its opinion. Appendix to ICC Petition at 45a. The court also added in its *sua sponte* order that (*Id.*):

> The Commission is not empowered [on remand] to rely mechanically on its approval of the underlying transaction as justification for the denial of a statutory right. On remand, to exercise its exemption authority, the Commission must explain why termination of the asserted right to participate in crew selection is necessary to effectuate the procompetitive purpose of the grant of trackage rights or some other purpose sufficiently related to the transaction. Until such a finding of necessity is made, the provisions of the Railway Labor Act and the Interstate Commerce Act remain in force.

Respondent UTU's assertion that the ICC's immunity provisions could not be read as relieving a carrier of its Railway Labor Act or contractual obligations to its employees because of 49 U.S.C. 11347, was not ruled upon. In the court of

appeals' view, its disposition of the case made a ruling on this issue unnecessary.[10] As the court stated (ICC App. at 20a-21a; footnote omitted):

> In view of this disposition, it is unnecessary to reach the second statutory issue whether ICC may ever waive the labor protection condition section (§ 11347) through the exercise of the exemption authority (§ 11341(a)). That issue turns on whether Section 11347 is viewed as a "law" that may be appropriately waived, or as a specific qualification on the exemption authority itself. We note only that the Commission has completely failed to show any conflict between these two sections of the Interstate Commerce Act, which we assume were meant to be read in concert rather than in conflict, and we need not comment on the unlikely event that the two sections may pose a genuine conflict in some later case.

This review proceeding on writs of certiorari has followed.

SUMMARY OF ARGUMENTS

I. Section 11341(a) of the Interstate Commerce Act provides that a carrier participating in a consolidation transaction approved by the ICC is relieved of restraints imposed by all laws, including federal law, "insofar as may be necessary to enable [that carrier] . . . to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission . . . ." 49 U.S.C. § 5(12)(1976), since recodified as 49 U.S.C. § 11341(a). That exemption, as its clear terms indicate, is limited, for it immunizes a carrier from only those laws as necessary to enable the

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[10] Initially, the court vacated the ICC decisions in their entirety without a remand, and, thus, it was clearly unnecessary to reach the issue of the relationship of Sections 11341(a) and 11347. That siutation changed, however, once the court amended its decision to remand this case to the ICC for a hearing. Because it is aggrieved by a remand, respondent UTU asked this Court to issue a writ of certiorari to review that undecided issue (Sup. Ct. No. 85-983); that cross-petition is still pending.

carrier to effectuate an approved transaction. Section 11341(a)'s necessity limitation is an essential part of the statute and, if that provision is to operate effectively as a check on what would otherwise be an unlimited power, some tribunal must determine whether it is necessary to relieve a carrier of a conflicting federal law in order to enable a carrier to effectuate a consolidation transaction approved by the Commission.

In view of both the structure of the Interstate Commerce Act, including its grant of exclusive jurisdiction to the ICC in Section 11341(a) to approve consolidation transactions, and the fact that this grant of immunity depends upon the shape of the transaction as actually approved by the Commission, the Commission should be the tribunal which determines whether the exemption is necessary when it determines what is in fact being approved. This is consistent with the ICC's approach, for the Commission has in the past considered whether Section 11341(a) should operate to relieve a carrier of obligations under other laws. Since the Commission must make specific findings and supply an articulated basis for its conclusions, it must explain why it is necessary to relieve a carrier of its obligations under other federal laws, including the Railway Labor Act, in order to enable that carrier to effectuate the financial transaction authorized by its order.

Here, as the court of appeals concluded, the Commission did not make any findings, either in 1982 when it authorized the trackage rights at issue or in 1983 when it refused to clarify its order, to explain why it was necessary for the trackage rights tenants to use their own crews to perform their operations. Since the Commission has not supplied a reasoned basis to conclude that Missouri Pacific employees must be precluded from participating in the crew selection process, its decisions on this point cannot stand.

II. Section 11341(a)'s immunity provision is further limited to the jurisdiction which Congress has given the Commission over consolidations. The ICC may not authorize a carrier to do an act over which the Commission has no jurisdiction, and, thus, Section 11341(a) cannot be viewed as immunizing that act. Although Congress has required the Commission to consider and to protect the interests of employees when it determines whether a consolidation transaction is

consistent with the public interest, Congress has not given the ICC the authority to regulate rail labor relations arising from consolidations. Congress established a regulatory scheme for rail labor relations in the Railway Labor Act which is separate and distinct from the Interstate Commerce Act and the Commission's jurisdiction. This separate nature of the two regulatory schemes is clear from the Interstate Commerce Act itself, for only rail carriers can invoke the ICC's jurisdiction over consolidations, and if the ICC concludes that a carrier-initiated consolidation is consistent with the public interest, its approval order is purely permissive. Only the carriers may decide whether to accept or to reject that grant of authority; rail labor has no voice in whether the carrier should accept or reject the consolidation authority. It is contrary to elementary principles of statutory construction to assert that this form of statutory scheme also gives an administrative agency power to control and direct the conduct of a third party who has no voice in whether to accept or to reject the ICC's permissive order.

The most telling evidence that Section 11341(a) was never intended to extend to rail labor relations, including the Railway Labor Act, is the fact that for over sixty years during which two forms of regulation have existed side by side, the ICC had never concluded, until this case, that it should regulate a carrier's labor relations. In fact, its consistent position prior to this case was that the two forms of regulation were separate and distinct.

Any question as to whether the ICC had jurisdiction over rail labor relations matters was laid to rest in 1976 when Congress amended the Interstate Commerce Act to enhance the levels of protection which the ICC was required to impose each time the Commission approved a consolidation transaction. Since 1976, the ICC must include in the protective arrangement which it imposes, provisions that require carriers participating in an approved transaction to preserve collective bargaining rights of employees and to give all interested employees a voice in the crew selection process. Consequently, in the case at bar, the ICC's order cannot be viewed as relieving a carrier of its Railway Labor Act obligations, nor can that order be viewed as authorizing the carrier to deprive employees of a voice in the crew selection process.

ARGUMENT

1. Contrary To Petitioners' Assertions, Section 11341(a) Of The Interstate Commerce Act Does Not Operate In A Vacuum, But, Rather, Requires As A Predicate To Its Application An ICC Decision Which Supplies A Reasoned Basis To Conclude That A Carrier Has Been Relieved Of Its Obligations Under Another Federal Law

Petitioners ICC and MKT, joined by the United States and by our nation's railroads, argue that the court of appeals erred in reading Section 11341(a) of the Interstate Commerce Act, 49 U.S.C. § 11341(a), as requiring the Commission to supply a reasoned basis for purporting to relieve a carrier participating in a transaction approved under the Act's consolidation provisions, of its obligations under the Railway Labor Act, 45 U.S.C. § 151, *et seq.* According to petitioners and to their supporters, Section 11341(a) is self-executing and automatically operates to relieve a carrier of any obligation imposed by a federal or state law which might impede the effectuation of an approved transaction in the manner proposed to the Commission. That exemption, petitioners assert, applies even if the ICC never addressed the specific means chosen by the carrier to implement its authorization. Respondent UTU respectfully submits that petitioners' view of Section 11341(a) is without merit, for their reading of that immunity provision impermissibly expands the range of carrier actions within its scope, and effectively reads the "necessity" component out of that statute.

A. Section 11341(a) Is Limited And Requires A Necessity Determination

It is axiomatic that the "starting point" in any case involving the interpretation of a federal statute is the "language employed by Congress." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979). Where that language is clear, the inquiry into its meaning should cease, for Congress is presumed to have intended what the plain language of its statutes states. *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 179 (1980). Moreover, since Section 11341(a) is in effect an implied repeal statute, it must not be expanded beyond its literal terms—*i.e.*, it must be construed narrowly. *E.g., Square*

D Co. v. Niagara Frontier Tariff Bureau, 476 U.S. ____, ____ 90 L.Ed.2d 413, 425 (1986); *accord, Watt v. Alaska*, 451 U.S. 259, 267 (1981). When those principles are applied to Section 11341(a), it becomes clear that this immunity provision is not as expansive as petitioners believe. Moreover, respondent UTU respectfully submits, the Interstate Commerce Act itself, prior decisions by this Court and past ICC practice all dictate that the ICC initially establish the scope of that immunity provision; this requires, as the court of appeals concluded, an ICC decision which supplies a reasoned basis for the application of Section 11341(a)'s immunity.

Section 11341(a) provides in pertinent part that: "A carrier . . . participating in [an] . . . approved . . . transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction . . . and operate property . . . acquired through the transaction." 49 U.S.C. § 11341(a). That language provides today, as it essentially prescribed when first enacted in 1920,[11] that a railroad consummating a "transaction" approved by the ICC under the consolidation provisions of the Act (*i.e.*, 49 U.S.C. §§ 11342-11351) is relieved from the operation of all "restraints or prohibitions by law, State or Federal, in so far as may be necessary to enable [that railroad] . . . to do anything authorized . . . by any order" of the ICC under the consolidation provisions. Section 407 of the Transportation Act of 1920, *supra* note 11, 41 Stat. at 482; *compare*, 49 U.S.C. § 11341(a), *with*, § 7 of Transportation Act of 1940, *supra* note

[11] Section 11341(a) was first enacted as Section 5(8) of the Interstate Commerce Act by Section 407 of the Transportation Act of 1920, 41 Stat. 456, 482. It was subsequently reenacted with modifications by Section 202 of the Emergency Railroad Transportation Act of 1933, 48 Stat. 211, 219, as Section 5(15) of the Interstate Commerce Act. Its last substantive change, except for an amendment in 1982 which is not relevant here (*see*, § 21(a) of the Bus Regulatory Reform Act of 1982, 96 Stat. 1102, 1122)), occurred in 1940 when it was reenacted as Section 5(11) of the Interstate Commerce Act by Section 7 of the Transportation Act of 1940, 54 Stat. 898, 908-09. Section 11341(a)'s current version is the result of the codification of the Interstate Commerce Act which was effected by Pub. L. No. 95-473, 92 Stat. 1337 (1978). That recodification, as stated in Section 3(a) of that Act, was intended to be without substantive change. 92 Stat. at 1466.

11, 54 Stat. at 908-09. Even if Section 11341(a) is viewed as being self-executing as petitioners assert, it is clear that Congress has limited Section 11341(a)'s application to only those laws which, if enforced, would prohibit a carrier from implementing the order of the ICC.

Since Section 11341(a) is limited, the logical question presented by that conclusion is whether any tribunal, and if so, which one, is to determine whether the exemption is necessary in a particular case. Petitioners, however, assert that no agency or court need make a necessity determination, either at the time that a transaction is approved or after, because, in petitioners' view, Section 11341(a)'s immunity is self-executing and automatically flows from the ICC's approval of a transaction as being in the public's interest. Prior approval necessity determinations, petitioners assert, are not contemplated by the Act because the Act requires simply that the transaction be consistent with the public interest. 49 U.S.C. § 11344(c). Post-approval proceedings, petitioners assert, are also contrary to the Act, for they assert that post-approval "necessity" proceedings would frustrate the "basic purpose" of the Act's consolidation provisions, which, according to petitioners, is to encourage carrier-initiated, voluntary consolidation plans. ICC Br. at 34-35. In other words, the carriers propose the manner in which they will effectuate a consolidation transaction, and if the Commission finds that transaction to be consistent with the public interest, the carriers will be relieved of all conflicting legal obligations and may implement their proposal, even if the transaction could be accomplished in another way which would be just as acceptable to the ICC and would not ignore those legal obligations. Respondent UTU disagrees with petitioners' argument, for such an expansive view of Section 11341(a) effectively writes the necessity component out of the law. *See, Texas & New Orleans R. Co. v. Brotherhood of Railroad Trainmen*, 307 F.2d 151, 159-60 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963). This was obviously not Congress' intent, for no statute should be read in such a way that limiting language is rendered superfluous. *National Insulation Transportation Committee v. ICC*, 683 F.2d 533, 537 (D.C. Cir. 1982).

Since the necessity component of Section 11341(a) is an essential part of the scope of that section, it must be considered by either the ICC or by a court which is subsequently called upon to enforce the obligation from which the railroads contend they have been made immune. Respondent UTU respectfully submits that the structure of the Interstate Commerce Act requires that it be the ICC which passes on this issue.

As the court of appeals noted in its decision, disputes over the application of Section 11341(a) have not frequently arisen, partly because the necessity for the waiver is usually clear. ICC App. at 16a. That is so, respondent UTU submits, because the need for a waiver depends upon the order of the Commission, and where the order of the agency clearly specifies what is to be performed, the application of Section 11341(a) should be obvious. *E.g., Texas v. United States,* 292 U.S. 522 (1934). However, where the order of the agency does not specify that an approved transaction is to be accomplished in a particular way which creates a conflict with other obligations, the justification for the waiver is not present. *Accord, Central New England Ry. v. Boston & Albany R.R.,* 279 U.S. 415, 420 (1929) ("without such a conflict [between legal obligations and an order of ICC which expressly mentions such an obligation], there could be no justification for holding that the order would also operate sub silentio to release a carrier from" its legal obligation). Indeed, this is apparent from the primary case relied upon by petitioners, *BLE v. Chicago & North Western Ry.,* 314 F.2d 424 (8th Cir.), *cert. denied,* 375 U.S. 819 (1963), for in that case the court quoted with approval and relied upon the ICC's statement in *Chicago, St. Paul, Minneapolis & Omaha Ry.—Lease,* 295 I.C.C. 696, 702 (1958), that although the Commission need not determine and declare that a carrier is relieved from particular laws, the agency must "'make clear what the carrier is authorized to do.'" 314 F.2d at 432.

Here, as the court of appeals observed, the ICC's order in 1982 approving the MKT and D&RGW trackage rights requests did not make clear the fact that the agency was also approving their crewing proposals. ICC App. at 13a n.3. In fact, rail labor reasonably believed that the carriers' trackage rights proposals, including the crewing provisions, were quali-

fied by the employee protective provisions which the ICC prescribed in its order, for those protective conditions were imposed as a condition of the ICC's grant of trackage rights. 366 I.C.C at 654, § 19. That limitation of the ICC's approval is not lessened by the Commission's approval of the trackage rights' proposals themselves; the MKT's and D&RGW's trackage rights request were approved only "to the extent and under the terms and conditions" stated in the decision and order. 366 I.C.C. at 654, § 14. Since those employee protective conditions required petitioner MKT and the D&RGW, along with the Missouri Pacific, to preserve collective bargaining rights and to give all interested employees a voice in the crew selection process,[12] it is simply incorrect to say that the ICC's order authorized MKT and D&RGW to deprive Missouri Pacific employees of whatever Railway Labor Act or statutory right they may have had to participate in the crew selection process. Consequently, at the very least, the ICC did not make clear what the carrier was authorized to do.

Petitioners nevertheless assert that the need for the waiver is apparent because the MKT and D&RGW specified their crewing proposals in their trackage rights application. The short answer to this assertion, however, is that the carriers' applications are not the order of the Commission. *United*

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[12] Petitioners assume that the MKT's crewing proposal did not violate Article 1, Section 4 of the employee protective conditions which requires that the selection of forces shall be made on a basis provided by an agreement encompassing "all employees involved," because, in their opinion, Art. 1, § 4 does not give affected employees of one railroad the right to insist that another railroad involved in the transaction bargain with them. *See*, ICC Pet. at 8 n.4; MKT Br. at 7-8, 11 n.6. That assumption is false because, as the district court found in *Missouri Pac. R.R. v. UTU, supra*, ICC Pet. at 35 n.12, the plain terms of Art. 1, § 4 clearly provide for negotiations among all interested employees and railroads to devise a method to select forces fairly and equitably. That plain meaning is their intended meaning, for those provisions were devised from Sections 4 and 5 of the Washington Job Protection Agreement of 1936 (*see, New York Dock Ry. v. United States, supra*, 609 F.2d at 95) which the ICC concluded long ago required *all railroads* participating in a transaction to give advance notice to *all involved employees* and to negotiate an implementing agreement which apportions the adverse effect "among the employees of both railroads on the basis of an equitable and acceptable agreement." *Southern Ry.—Control—Central of Ga. Ry.*, 331 I.C.C. 151, 166, 173 (1967).

States v. Rock Island Motor Transit Co., 340 U.S. 419, 445 (1951); *Southern Ry.—Control—Central of Ga. Ry., supra*, 331 I.C.C. at 165. Since the Commission granted those applications subject to the provisions of the employee protective conditions, inconsistent provisions in the application simply cannot be viewed as superseding the agency's order.

Section 11341(a) grants carriers an immunity from inconsistent laws because Congress has intended that the ICC's authority over carrier consolidation proposals should be exclusive. 49 U.S.C. § 11341(a); *Texas v. United States, supra*, 292 U.S. at 531. While petitioner UTU submits that this exclusive authority does not extend to matters outside the Commission's jurisdiction (for example, Section 11341, *et seq.*, does not give the ICC authority over a carrier's labor relations), the scope of an ICC order is clearly a matter within the ICC's primary, if not exclusive, jurisdiction. *See generally, Engelhardt v. Consolidated Rail Corporation, et al.*, 756 F.2d 1368, 1369 (2d Cir. 1985); *Zapp v. UTU*, 727 F.2d 617, 625 (7th Cir. 1984). Moreover, if rail labor or any party sought to enforce rights which they contend were not immunized by Section 11341(a), the railroads would obviously assert that such a suit was a collateral attack on an ICC order; in view of 28 U.S.C. §§ 2321(a) and 2341, *et seq.*, the railroads' defense might succeed. *See, Railway Labor Executives' Assoc. v. Staten Island R.R.*, 792 F.2d 7 (2d Cir. 1986). Consequently, it logically follows that the current structure of the Interstate Commerce Act requires that the ICC be the tribunal to determine whether its order authorizes a carrier to perform an act which conflicts with other statutory obligations.

B. In Determining Whether A Carrier Is To Be Relieved Of Inconsistent Federal Laws, The ICC Must Supply A Reasoned Basis For Its Decision

Once it is accepted that the ICC has the responsibility to determine exactly what it is that the carriers in this case have been authorized to do, it follows, respondent UTU submits, that the agency must then supply a reasoned basis for its conclusion. Petitioner ICC is not a legislature, and, therefore, it must include in any decision that it renders under the consoli-

dation provisions of the Interstate Commerce Act "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record . . . ." 5 U.S.C. § 557(c)(A). If these findings or conclusions are not entered, a reviewing court must set aside the challenged agency action, for, as this Court has observed:

> "[A] simple but fundamental rule of administrative law . . . is . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action . . . ."

Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 169 (1962), *quoting, SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

Petitioners do not challenge this principle, but they assert that there is no need for findings in this case because Section 11341(a) is self-executing and automatically flows from the agency's specification of exactly what a carrier is authorized to consummate. That argument, however, ignores the fact that, in specifying what a carrier is authorized to do, the Commission must make detailed findings and conclusions. Moreover, when an act authorized by the ICC as being within the public's interest conflicts with another federal law, the Commission must show that it considered the policies expressed in those laws in determining whether the relevant transaction is within the public's interest. *United States v. ICC*, 396 U.S. 491, 511-12 (1970); *Southern Pacific Transportation Co. v. ICC, supra*, 736 F.2d at 721 n.10. That determination, respondent UTU submits, requires the Commission to articulate its reasons and to show that it has considered the policies of the conflicting laws. *United States v. ICC, supra*, 396 U.S. at 514.

Relying upon *Schwabacher v. United States*, 334 U.S. 182 (1948), petitioners argue that the court of appeals erred in requiring the Commission to explain why it was necessary for the MKT and D&RGW to be relieved of whatever obligations

the Railway Labor Act might impose in connection with their crew proposals.[13] Petitioners assert that the agency must find only that the proposed transaction is within the public's interest, and its inquiry must end at that point, for "it is not open to the Commission to make judgments about which terms [devised by the applicants] were sufficiently 'necessary' to override other laws." ICC Br. at 30. Respondent UTU disagrees, for once again petitioners' construction of Section 11341(a) ignores the necessity component.

Schwabacher and cases dealing with Section 11341(a)'s antitrust immunity [14] do not support petitioners' argument, for each of those cases involved conflicts between matters committed to the complete control of the Commission and the applicable state or federal law. For example, in *Schwabacher* this Court observed that the state law at issue in that case dealt with an integral part of the capital structure of the railroad whereas the Interstate Commerce Act gave the ICC "complete control of the capital structure to result from a merger." 334 U.S. at 195. The concept of preemption which is so obviously reflected in Section 11341(a) requires that the federal law prevail over the State law. *Texas v. United States, supra,* 292 U.S. at 534-35. Moreover, Congressional intent to have the Interstate Commerce Act control is obviously true whenever a proposed merger conflicts with antitrust laws. In each of those cases, therefore, Congress had specified that the sole test to be applied in determining whether the matters in question should be approved was the public interest test, and, thus, there was no justification in those cases for adding a further test—*i.e.*, whether the exemption was necessary.

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[13] Echoing the dissent, petitioners assert that it was inexplicable for the court of appeals to have indulged the unions' belief that they had an established right to participate in the MKT's and D&RGW's crewing decisions. *E.g.*, ICC Br. at 23 n.16. What petitioners fail to recognize in making that assertion is that the ICC does not have jurisdiction to decide whether rail labor is correct in contending that there is a right under the Railway Labor Act to require the Missouri Pacific to negotiate on the issues at stake (*see, Order of R.R. Telegraphers v. Chicago & N.W. Ry.*, 363 U.S. 330 (1960)); rather, in determining whether § 11341(a) should apply to that asserted right, the ICC must assume that rail labor had such a right. *Schwabacher v. United States, supra,* 334 U.S. at 190.

[14] *E.g., United States v. ICC, supra.*

As explained in Argument II, *infra,* however, the case at bar does not involve a matter committed to the control of the ICC, but, rather, involves a matter which is at best related to the means which a carrier may choose to effectuate the transaction at issue—*i.e.,* the trackage rights. In such cases respondent UTU respectfully submits, the fact that Section 11341(a) must be construed narrowly because it is an implied repeal law, requires the Commission to examine the means proposed by the carrier to ascertain whether that is the only method by which the transaction can be accomplished. *E.g., City of Palestine v. United States,* 559 F.2d 408 (5th Cir. 1977), *cert. denied,* 435 U.S. 950 (1978). Any other approach to a carrier proposal which involves an infringement upon rights granted by statute to third parties would give the railroad the ability to unilaterally decide which statutory obligation will become immunized by Section 11341(a); such an approach will allow the carrier to bind a nonconsenting third party even though another arrangement suitable to the third party would also have been acceptable to the Commission. Respondent UTU respectfully submits that Section 11341(a) was never intended to give the railroads such unbridled power over matters which involve parties who are not applicants. *Texas & New Orleans R.R. v. Brotherhood of Railroad Trainmen, supra,* 307 F.2d at 159-60.

This limited aspect of Section 11341(a)'s reach to matters which do not pose an obstacle to the effectuation of the acutal financial transaction, as contrasted with the means chosen by the carriers to implement that transaction, may be seen by examining the *City of Palestine* case. In that case, the Fifth Circuit was asked to review a decision of the Commission which had authorized under what is now Section 11341(a) the abrogation of an agreement which a subsidiary of the Missouri Pacific had entered into years before to keep certain employees, offices and shops in Palestine, Texas.[15] Missouri Pacific had proposed a corporate restructuring—*i.e.,* a merger—which con-

[15] Section 11341(a)'s limited reach, even according to the ICC, may also be seen from the fact that the ICC recognizes that this section does not apply to contracts between a carrier and a third party. *St. Louis S. Ry.—Purchase,*

(footnote continues)

templated moving those employees and facilities, and in authorizing that merger under what is now Section 11344, the ICC concluded that Missouri Pacific should be relieved of its obligations under that agreement because those obligations were contrary to the public interest as being a burden on interstate commerce. *Missouri Pac. R.R.—Merger*, 348 I.C.C. 414, 430 (1976), *rev'd in part, City of Palestine v. United States, supra.* Since it was clear that an abrogation of that agreement was not necessary to enable the corporate restructuring to be accomplished, the Fifth Circuit concluded that the ICC's decision was in excess of its powers under what is now Section 11341(a); as the court stated in 559 F.2d at 415:

> Congress allowed the ICC significant power to effectuate approved transactions, but it did not authorize gratuitous destruction of contractual relations—even when it serves the general public interest—when the destruction is irrelevant to the success of approved transactions.

That reasoning is clearly in keeping with decisions of this Court which have examined the scope of Section 11341(a)'s exemption, for in those few cases, as the court of appeals in this case observed, this Court has indicated that Section 11341(a) applies "only if those . . . laws pose an obstacle to the transaction." ICC App. at 17a. For example, in *Texas v. United States, supra,* this Court upheld an ICC order which authorized the lease of a railroad incorporated in Texas by a lease agreement that, as modified by the ICC order, authorized the lessee to relocate the lessor's general offices and shops, contrary to Texas law. In upholding that ICC order, however, this Court noted that the Commission's order did not nullify another Texas law which required the carriers to keep a public office in

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(footnote continued)

363 I.C.C. 319, 367 (1980) ("we lack the power to modify trackage rights agreements executed prior to former Section 5(2)(a)'s [now, 49 U.S.C. 11343(a)] enactment in the Transportation Act of 1940"); *see also, Gulf, M. & O. R.R.—Abandonment*, 282 I.C.C. 311, 335 (1952). The Fifth Circuit in its *City of Palestine* decision did not overrule the ICC's view that Section 11341(a) did not apply to contracts, but rather, assumed for purposes of argument that the ICC could abrogate contracts. 559 F. 2d at 414.

Texas where various corporate records were to be maintained for public inspection. By limiting the exemption to solely the general office law—*i.e.*, one which if complied with "would entail unnecessary and burdensome expenditures in operation" (292 U.S. at 533)—this Court noted that: "There is no interference with the supervision of the State over the lessor in matters essentially of state concern, as distinguished from the operations in which their effect upon interstate commerce are of national concern." *Id.* Although petitioners attempt to belittle this Court's similar approach in *Callaway v. Benton*, 336 U.S. 132, 140-41 (1949), and *Seaboard Air Line R.R. v. Daniel*, 333 U.S. 118, 126 (1948) (*see*, MKT Br. at 34-35), petitioners have been unable to point to one case by this Court which squarely holds that Section 11341(a) gives railroads the power to structure their transactions so as to be immunized from laws which do not pose an obstacle to the effectuation of the approved financial transaction.

After being rebuffed by the Fifth Circuit in the *City of Palestine* case, petitioner ICC revised its formulation of when it should immunize a carrier from the operation of other laws.[16] On remand, the ICC noted that the Fifth Circuit's decision contained language which led the Missouri Pacific, in seeking a petition for a writ of certiorari, to describe that appellate court's decision as holding that "the Commission is limited by § 5(11) [now, § 11341(a)] and may nullify state law restraints only where the restraints would stand in the way of or absolutely prohibit a proposed consolidation." *Missouri Pac. R.R. v. City of Palestine* Sup. Ct. No. 77-870, Pet. at 13 (footnote omitted).

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[16] Petitioner ICC claims that the court of appeals misspoke when it said that Congress has given the Commission broad powers to immunize transactions from later legal obstacles; according to petitioner, it is § 11341(a) and not the ICC which grants that immunity. ICC Br. at 19-20. Petitioner's semantic dispute is erroneous, for the ICC has stated before that it "can and should immunize" consolidations (*e.g.*, *Union Pac. Corp.—Control*, *supra*, 336 I.C. at 549), and it has also withheld or limited that section's immunity in other cases. *Sea-Land Service, Inc.—Control*, 348 I.C.C. 42, 59-52 (1975).

However, in the ICC's view that language was merely *dicta*.[17] According to the Commission, the Fifth Circuit's decision "stands for the narrower principle that the Commission may nullify only State law restraints that are materially related to a proposed merger or consolidation within the Commission's jurisdiction." *Missouri Pac. R.R.—Merger*, 354 I.C.C. 763, 764 (1978).[18] Petitioner ICC has applied that formulation of Section 11341(a) to this case. ICC Br. at 41 n.26.

Petitioner ICC's reliance on its "material terms" articulation as to the reach of Section 11341(a), even though erroneous as being too broad, proves two things which negate the ICC's arguments in this case. First, it shows that Section 11341(a) is not totally automatic, for it requires a showing of some degree of necessity over and above the public interest determination. And second, *Burlington Truck Lines, Inc. v. United States, supra*, requires as the court of appeals held, that the Commission supply a reasoned basis for that necessity conclusion. Here, as the the court of appeals noted, the ICC did not provide in this case, either in 1982 or in 1983, "a shred of reasoning to support its view that completion of the [trackage

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[17] Such *dicta* included the court's statement that:

> [W]e conclude that the ICC's power only extends to setting aside state restraints to the effectuation of an approved section 5(2) transaction and no further. Although the Palestine Agreement may burden MoPac, the agreement clearly is not an obstacle to the merger . . . and does not threaten the merger's success.

559 F.2d at 414.

[18] The Commission's formulation of its standard in response to the *City of Palestine* decision was not unanimous; Chairman O'Neal took issue with the new formulation and stated:

> In exercising its authority under this section in the future, the Commission should apply a "substantial burden" test, to take jurisdiction in situations where the operation of a State law might not actually stop a section (5) [*sic*] transaction but where it might substantially impair, or reduce the benefits to the public interest resulting from the transaction. If the State law does not impose such a burden, the Commission should not seek to abrogate it.

354 I.C.C. at 765.

rights] transactions required shielding crew selection from the Railway Labor Act." ICC App. at 19a (footnote omitted).

Petitioners cannot avoid that conclusion by contending that the crew provisions of the trackage rights applications were "material terms" (ICC Br. at 41 n.26; MKT Br. at 33, 39-40), for that bare contention, as the court of appeals noted, does not supply the reasoned basis required by *Burlington Truck Lines* in this case. "[M]erely stating in totally conclusory terms that something is a 'material term' is inadequate to provide the basis for the conclusion that waiver is necessary to fruition of the transaction, as § 11341(a) requires." ICC App. at 19a n.7. As the court of appeals explained, this lack of a reasoned basis is "especially conspicuous in light of evidence suggesting that the [crew selection] issues would *not* interfere with the trackage rights." ICC App. at 19a-20a (emphasis in original). As the court summarized (*Id.* at 20a; footnote omitted):

> First, the Commission specifically left the question of trackage compensation open to later negotiation between the railroads, 366 ICC at 589-590; it never suggested why the question of crew selection was somehow so much more necessary to fruition of the transaction that normal Railway Labor Act procedures could not apply to the issue of crew selection. Second, ICC noted that MKT might find it necessary to use more crews than it suggested in its application, 366 ICC at 569-570; again, the Commission never suggested why the question of crew selection was so much more necessary to fruition of the transaction. On both of these issues, then, the Commission expressed a willingness to leave subsidiary trackage issues to later determination. Finally, the Denver & Rio Grande operated for some months with existing Missouri Pacific crews, and there has been no suggestion that the trackage rights were somehow frustrated as a result.

Petitioners' and the dissent's reliance on the fact that the pro-competitive aspects of the trackage rights requires the use

of the trackage rights tenant's own employees (*e.g.*, MKT Br. at 39-40) does not supply the reasoned basis, for essentially two reasons. First, there is no evidence in this record to show that Missouri Pacific employees would not perform the trackage rights operations as efficiently as MKT operating employees would; indeed, the D&RGW's successful use of Missouri Pacific employees belies petitioners' post hoc rationalization on this point. And second, as the court of appeals noted, the "ICC has never given the faintest hint of a reasoned explanation why crew selection is so essential to that purpose that the otherwise applicable provisions of the Railway Labor Act must be waived." ICC App. at 20a n.8. Since the ICC has not adopted petitioners' reasoning, counsel's arguments cannot be used to supply the missing articulated basis. *Burlington Truck Lines, Inc. v. United States, supra,* 371 U.S. at 168-69.

In short, the ICC's own use of Section 11341(a) in this case and in the past shows that the court of appeals was correct in concluding that Section 11341(a)'s immunity does not attach automatically to every proposal made by an applicant in its application to the Commission. Rather, the ICC must supply a reasoned basis to justify a railroad's subsequent claim that Section 11341(a) has relieved it of an otherwise binding obligation because such a grant of immunity is necessary to effectuate the approved financial transaction.

II. Section 11341(a)'s Grant of Exclusive Authority To The ICC Over Railroad Consolidations Does Not Give The Commission Jurisdiction To Regulate Labor Relations, Nor Does It Give That Agency The Power To Relieve A Rail Carrier Of Obligations Which Section 11347 Of The Interstate Commerce Act Requires Be Imposed To Protect The Interests Of Rail Carrier Employees

Besides relying upon their view of the self-executing nature of Section 11341(a), petitioners, the United States and the *amici curiae* go further and assert that the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, must give way to the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*, for the need for such

an exemption is clear. That need is clear, petitioners and *amici* assert, because the major dispute[19] resolution procedures—*i.e.*, the procedures which would be applicable in arriving at changes in working conditions after a consolidation transaction is effectuated—are purposefully "long and drawn out" (*e.g.*, *Brotherhood of Railway Clerks v. Florida East Coast Ry.*, 384 U.S. 238, 246 (1966)) and do not insure that the parties will arrive at an agreement since there is no requirement in the Railway Labor Act for compulsory arbitration of such disputes. *See*, ICC Br. at 37-38 n.24. Respondent UTU respectfully submits that petitioners' arguments concerning the interrelationship between the Railway Labor Act and the Interstate Commerce Act are without merit, for these arguments ignore the fact that Congress has not given the Commission the power to regulate a railroad's labor relations. Moreover, any belief that the Commission has such power has been laid to rest by the 1976 amendments[20] to what is now Section 11347 of the Interstate Commerce Act, 49 U.S.C. § 11347, which commands that the fair arrangement which the ICC must impose as a condition of its approval of any rail consolidation to protect the interests of employees, require rail carriers to preserve collective bargaining rights and to give all interested employees a voice in the crew selection process. Consequently, it is simply erroneous to contend, as petitioners do here, that the Commission could approve a transaction which authorizes a rail carrier to ignore its obligations under the Railway Labor Act or under the crew selection process of the ICC imposed employee protective provisions.

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[19] A "major dispute" under the Railway Labor Act is one over the formation of new or modified rates of pay, rules of working conditions which will apply once an agreement is reached. This is to be distinguished from a "minor dispute"—*i.e.*, a dispute over the interpretation or application of an existing agreement—because minor disputes unresolved after conferences between the parties are to be settled by Adjustment Boards which is a form of compulsory arbitration. *Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711 (1945). Major disputes are to be conferenced, mediated and resolved by negotiations and, if necessary, resort to self-help. Section 7, First of the Act, 45 U.S.C. § 157, First, prohibits compulsory arbitration of major disputes.

[20] Section 402(a) of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, 62, amended Section 5(2)(f) of the Interstate Commerce Act, now § 11347. *See*, page 46, *infra*.

A. The Commission's Jurisdiction Over Rail Consolidations Does Not Give That Agency The Power To Regulate A Rail Carrier's Labor Relations

While Section 11341(a) provides that the ICC's "authority . . . under this subchapter [*i.e.*, Subchapter III of Chapter 113] is exclusive" (49 U.S.C. § 11341(a)), it should be apparent that this exclusive authority extends only to matters over which Congress has given the ICC jurisdiction under the Interstate Commerce Act's consolidation procedures. Indeed, that is the plain import of the language which Congress used in Section 11341(a), both now and since its last substantive amendment on this point in 1940. *See* note 11, *supra*. As pertinent here, that jurisdiction is defined in Section 11343(a) of the Act, 49 U.S.C. 11343(a), where Congress has provided that:

> The following transactions involving carriers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I . . . of chapter 105 of this title may be carried out only with the approval and authorization of the Commission:
>
> (6) acquisition by a rail carrier of trackage rights over . . . a railroad line . . . owned or operated by another rail carrier.

Petitioners give the ICC's jurisdiction a broad reach and assert that approval of a consolidation confers an exemption of sufficient breadth to permit implementation of the "terms" of the transaction as proposed by the carrier in its application for approval. ICC Br. at 28. Petitioners further assert that this exclusive jurisdiction extends to labor relations matters, for they contend that there is a clear need for the Commission "to prescribe the methods for resolving labor issues that might otherwise frustrate transactions that serve the public interest." ICC Br. at 28 n.18. Respondent UTU respectfully submits that the ICC's belief that there is a clear need for it to act as a labor board does not equal congressional approval of such jurisdiction. Indeed, Congress has spoken on this subject by enacting the Railway Labor Act, and that Act, which regulates labor

relations in the rail industry, does not give the ICC any role in enforcing or prescribing that regulation.[21]

Petitioners' view that there is an overlap of jurisdiction by virtue of the ICC's jurisdiction over consolidations is inaccurate, for the legislative history of the rail consolidation provisions of the Interstate Commerce Act shows that Congress has always viewed the ICC's jurisdiction as not extending to labor relations matters. Railroads have been subject to federal regulation as an industry for almost 100 years (*see,* Act of February 4, 1887, 24 Stat. 379), and during virtually that same time period, Congress has also regulated rail labor relations. *E.g.*, Arbitration Act of 1888, 25 Stat. 501. Rail regulation by the ICC became more extensive after the railroads were returned to private ownership by the Transportation Act of 1920, 41 Stat. 456, but Congress has never given the ICC control over labor relations matters, even though such control has been proposed on several occasions. *E.g.*, H.D. Wolf, THE RAILROAD LABOR BOARD, Chap XV (University of Chicago Press, 1927).

Although Congress has long recognized that stable labor relations are essential to an efficient national rail transportation system and that there is an overlap between this goal and sound financial regulation by the ICC (*e.g., United States v. Lowden,* 308 U.S. 225, 235-36 (1939)), Congress has nevertheless treated the two forms of regulation separately. For example, while Title IV of the Transportation Act of 1920 made extensive amendments to the Interstate Commerce Act, including adding for the first time the predecessor of what is now Section 11341(a), Title III of that Act created the Labor Board to investigate and to report on rail labor disputes; it provided for voluntary adjustment boards to consider minor disputes; and it required both rail labor and management to exert every reasonable effort to avoid any interruption to the operation of

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[21] Congress gave the ICC, however, a limited role under the Railway Labor Act. First, the ICC is to determine whether an electric powered railroad is a "carrier" within the meaning of Section 1, First of the Act, 45 U.S.C. § 151, First. And second, the ICC is to establish classifications of employees, but is not to define the crafts according to which employees may be organized. 45 U.S.C. § 151, Fifth.

any carrier. 41 Stat. at 469. There is no indication in the Transportation Act of 1920 that Congress also intended to give the ICC exclusive jurisdiction over labor relations matters to the exclusion of the Labor Board or adjustment boards, when it first enacted in that Act what is now Section 11341(a). Indeed, by placing the two forms of regulation in separate titles of that Act, it must be presumed that the ICC's exclusive authority over consolidations did not include jurisdiction over labor relations matters.

This separateness between the two forms of regulation is borne out by the Emergency Railroad Transportation Act of 1933 [hereinafter, "ERTA"], 48 Stat. 211. As shown above (*see* note 11, *supra*), Congress reenacted in Section 202 of that Act what is now Section 11341(a) as part of its grant of jurisdiction to the ICC over railroad consolidations. *See, Texas v. United States, supra,* 292 U.S. at 534-35. That Act also created the office of the Federal Coordinator of Transportation who was given the specific authority "to encourage and promote or *require* action" on the part of railroads to "avoid unnecessary duplication of services and facilities . . . [and] avoid other wastes and preventable expense . . . ." Section 4 of ERTA, 48 Stat. at 212 (emphasis added). Congress also gave orders of the Coordinator an immunity similar to that reenacted for ICC consolidation orders, but it specifically limited that immunity in several respects. First, laws "for the protection of the public health or safety" were not to be waived; and, as relevant here: "[N]othing herein shall be construed to repeal, amend, suspend, or modify any of the requirements of the Railway Labor Act or the duties and obligations imposed thereunder or through contracts entered into in accordance with the provisions of said Act." Section 10(a), ERTA, 48 Stat. at 215; *see also,* Section 10(b), 48 Stat. at 215.

Petitioner MKT asserts that Congress' failure to include in what is now Section 11341(a) an express statement that the ICC's immunity power does not extend to the Railway Labor Act, is "an evident recognition of the fact that no such exception was implicit in" what is now Section 11341(a). MKT Br. at 24. That assertion is erroneous, for petitioner MKT has failed to

take into account the broader jurisdiction which the Coordinator had, as compared with that given to the ICC. As this Court has stated before:

> From the initial enactment in the Transportation Act of 1920 . . ., to the most recent comprehensive reexamination of these provisions in the Transportation Act of 1940 . . ., Congress has consistently and insistently denied the Interstate Commerce Commission the power to take the initiative in getting one railroad to turn over its properties to another railroad. . . . The role of the Commission in this regard has traditionally been confined to approving or disapproving mergers proposed by the railroads to be merged.

St. Joe Paper Co. v. Atlantic Coast Line R.R., 347 U.S. 298, 305 (1954). Moreover, in passing on the validity of a consolidation transaction proposed by the railroads, the Commission's jurisdiction is limited to the financial transactions specified in Section 11343(a). The Coordinator, however, had the authority to require carriers to take certain actions and his jurisdiction ran to all matters which could permit railroads to operate more economically.

Congress recognized the Coordinator's broader jurisdiction could cover labor relations matters and it provided certain protections for employees, including advance notice of orders which will affect the interests of employees (Section 7(a)); a prohibition on reductions in number of jobs by reason of any action taken pursuant to the authority of the Coordinator (Section 7(b)); a guarantee against individual employees being deprived of employment or placed in a worse position with respect to compensation by reason of any action taken pursuant to authority of the Coordinator (*Id.*); and a specific recognition that the Coordinator's orders did not supersede the Railway Labor Act. Section 10(a). A comparable limitation on the scope of what is now Section 11341(a)'s immunity as not affecting Railway Labor Act rights was not necessary, for the simple reason that Congress had not even arguably given the ICC jurisdiction over labor relations matters.

Petitioners seek to find that jurisdiction by referring to the requirement in Section 11344(b)(1)(D) of the Interstate Commerce Act, 49 U.S.C. 11344(b)(1)(D), that in considering the public interest in certain consolidation proceedings, the ICC must consider "the interest of carrier employees affected by the proposed transaction." ICC Br. at 28 n.18. Petitioner MKT also refers to the passage of what is now Section 11347 during Congress' consideration of the Transportation Act of 1940 and argues that Congress' rejection of the Harrington Amendment [22] shows that Congress intended to allow carriers to implement consolidations irrespective of the fact that the ICC's approval might result in the unilateral alteration of working conditions "as long as those employees were compensated fairly under the Commission's labor protective conditions." MKT Br. at 31. Those assertions are without merit, for the Transportation Act of 1940 required the ICC to consider as part of its public interest determination the impact of the proposed transaction on employees, and to impose a fair and equitable arrangement "*to protect* the interests of the railroad employees affected" by the transaction. Section 7 of the Transportation Act of 1940, 54 Stat. 899, 906-07, adding 49 U.S.C. 5(2)(b) (emphasis added). It did not authorize the abrogation of employee rights.

Those concepts were not new in 1940, for the Commission had recognized since 1934 that the impact of a transaction on employees was an integral part of the public interest to be considered in deciding whether to approve a transaction (*St. Paul Bridge & Terminal Ry.—Control*, 199 I.C.C. 588, 596 (1934)), and for several years prior to 1940, it was imposing an arrangement to protect employee interests as a condition of its

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[22] Representative Harrington proposed that the Commission could not approve a transaction "if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees." 84 Cong. Rec. 9882 (1939). Rep. Harrington's amendment was eventually rejected and in its stead Congress included a requirement that the protective arrangement required to be imposed by Section 5(2)(f) as added by the Transportation Act of 1940 must provide at the minimum that affected employees receive at least a four year guarantee against being placed in a worse position with respect to compensation. *See, Brotherhood of Maintenance of Way Employes v. United States*, 366 U.S. 169, 174 (1961).

consolidation approvals. *See, United States v. Lowden, supra.* Employee interests were considered and protected, not because employee protection was the price to be paid to allow a rail carrier to change rates of pay, rules or working conditions, but rather, because Congress had determined that it was not in the public's interest for rail employees to provide the economic benefits which consolidations could achieve for railroads. *ICC v. Railway Labor Executives' Assoc.*, 315 U.S. 373, 377-79 (1942); *United States v. Lowden, supra,* 308 U.S. at 235-36. Requiring the ICC to consider and to protect the interests of employees is far different than allowing the Commission to authorize new rates of pay, rules, or working conditions, for the former is directed to the parties seeking ICC approval of a consolidation transaction—*i.e.*, the carriers—whereas the latter requires the ICC to direct rail labor to take certain action. As the ICC has said before:

> [U]nder section 5 of the Act [now § 11341, *et seq.*] we merely authorize or permit the applicant carriers to enter into a proposed transaction. We may not even compel the carriers to consummate an authorized transaction. . . .
>
> Under section 5(2)(f) of the Act, we are "required" to impose upon the carriers in each approved transaction conditions for the protection of railroad emplyees affected. But this section only authorizes the imposition of duties upon the carrier. It does not authorize us to direct the employees or organizations of employees to do anything . . . .

Chicago, St. Paul, Minneapolis & Omaha Ry.—Lease, supra, 295 I.C.C. at 701. Congress, respondent UTU respectfully submits, intended labor relations matters arising from a consolidation to be resolved by the procedures of the Railway Labor Act. *See generally, Air Line Pilots Assoc. v. CAB*, 667 F.2d 181 (D.C. Cir. 1981); *Delta Air Lines, Inc. v. CAB*, 543 F.2d 247, 260 (D.C. Cir. 1976)(Civil Aeronautics Board's jurisdiction over airlines does not extend to safety matters which are subject to jurisdiction of Federal Aviation Administration).

Respondent UTU's position that the ICC does not have jurisdiction over labor relations matters is supported by the ICC's treatment of the supposed conflict between the Interstate Commerce Act and the Railway Labor Act prior to 1983. Between 1940 and 1983, rail carriers occasionally argued before the Commission that the Interstate Commerce Act, by virtue of what is now § 11341(a), relieved the railroad of the obligations under the Railway Labor Act. However, in each case the ICC refused to find such a result. For example, in *Chicago, St. Paul, Minneapolis & Omaha Ry.—Lease, supra,* the carrier which leased and operated the properties of another railroad pursuant to an ICC order, sought a ruling by the Commission that the order had relieved it of whatever obligation the Railway Labor Act, and in particular, Section 6 of the Act, 45 U.S.C. § 156, might impose upon it to negotiate with employees over the manner in which it would integrate its operations with those of the leased carrier. According to the railroad, its original application had proposed an integration of the physical operations and the ICC's order was premised upon that assumption. 295 I.C.C. at 699. Consequently, the carrier asserted, what is now Section 11341(a) applied and relieved it of its obligations under Section 6 of the Railway Labor Act. 295 I.C.C. at 698-99. The carrier's request for a declaration that it was relieved of its Railway Labor Act obligations was denied. 295 I.C.C. at 702. After stating that it found nothing in the Act's consolidation provisions and, in particular, in the immunity provision, which "authorizes us to determine and declare the particular laws" immunized, the ICC added:

> Congress has not conferred upon us the power to determine the disputes which are subject to the Railway Labor Act or questions regarding the jurisdiction of the National Mediation Board, which, in effect, is what North Western [*i.e.*, the carrier] requests us to do.
>
> It is apparent that the Railway Labor Act has not prevented the North Western from effectuating the transaction authorized by the prior order. That order authorized the lease by North Western of the lines of railroad and other properties owned, used, or

> operated by the Omaha, and this has been accomplished.

Here, as in the *Chicago, St. Paul* case, it is apparent that the Railway Labor Act would not prevent the trackage rights tenants from effectuating the financial transaction authorized—*i.e.*, the transfer of the right to operate over the lines of the Missouri Pacific and Union Pacific.

In *Southern Ry.—Control—Central of Ga. Ry.*, 331 I.C.C. 151 (1967) (Report on Remand), the ICC was faced with an assertion by the Southern Railway that the Commission's control order and the employee protection imposed by that order superseded whatever rights collective bargaining agreements gave to employees. 331 I.C.C. at 168. That assertion was rejected by the Commission:

> [U]nder section 5(2)(f), we impose formulae of protective conditions *upon the carriers* seeking specific permissive authority under section 5(2) of the act, the purpose being to *protect* the interests of employees some of which in a particular case may well have been established under bargaining agreements executed pursuant to the Railway Labor Act. Rights obtained by employees under section 5(2)(f) are the minimum protection which an applicant carrier must provide in order to obtain this Commission's approval of its transaction. They are not, however, the maximum rights employees may gain. . . . The rights of railroad employees under their collective bargaining agreements, under the Washington Agreement, and under the protective conditions imposed upon the carrier under section 5(2)(f) are independent, separate, and distinct rights. . . . The rights under the former are based upon private contracts; those under the latter stem from our statutory duty to protect employees. . . . These protective conditions imposed upon carriers under section 5(2)(f) which provide affected employees compensatory protections for wages, fringe benefits and other losses are designed to apply after the carriers have arrived at their

> adjustments of labor forces *in accordance* with the governing provisions of their collective bargaining agreements so that the carriers may be enabled to carry an approved transaction into effect. . . .
>
> . . . By its terms, section 5(11) [now, Section 11341(a)] applies only to antitrust and other restraints of law from carrying "into effect the transactions so approved . . .". Neither the Washington Agreement nor the specific collective bargaining agreements between these roads and their employees is such a restraint, for indeed section 5 transactions have been successfully consummated in full compliance with such terms. . . . The essential problem to be resolved is an accommodation of laws, a role not foreign to us in section 5 transactions. . . . When balancing the national policy as to transportation with that of labor relations, we "act in a most delicate area . . . [and] policies of the Interstate Commerce Act and the labor act necessarily must be accommodated, one to the other." . . .
>
> The designated "exclusive and plenary power" of the Commission in section 5(11) cannot be so broadly construed as to brush aside all laws—be they statutorily created antitrust laws or voluntary contractual agreements made binding by the force of law. . . .

Southern Ry.—Control—Central of Ga. Ry., supra, 331 I.C.C. at 169-70 (emphasis in original). *See also, Norfolk & Western Ry.—Merger,* 347 I.C.C. 506, 511 (1974). Respondent UTU is not aware of one case prior to the case at bar in which the ICC held that tne Railway Labor Act was an obstacle to a transaction and must give way to the Interstate Commerce Act.

Respondent UTU's position as to the limited nature of the ICC's exclusive jurisdiction under Section 11341(a) is supported by the Fifth Circuit's decision in *Texas & New Orleans R.R. v. Brotherhood of Railroad Trainmen, supra,* in which the railroads sought to enjoin a strike by rail labor over the carriers' refusal to negotiate under the Railway Labor Act changes in

working conditions resulting from an ICC approved consolidation transaction. 307 F.2d at 158. As the Fifth Circuit observed, the railroads included in their application to the ICC "such detail . . . as to determine the major provisions of a new labor contract [to govern the new operations], although at no time were the unions brought into the negotiation of these agreements." *Id.* As occurred here (*Id.*):

> The appellants then argue that ICC approval of the agreements makes them binding on the unions. If so, not only does section 5 give the Commission power to approve a section 5(2) transaction, but it gives the carriers the right to legislate the terms of a continuing contract with a third party, although a different contract more favorable to the third party might have been equally acceptable to the Commission. We do not feel the statute may be so interpreted.

To support their arguments that the Interstate Commerce Act supersedes the Railway Labor Act, petitioners rely upon *Brotherhood of Locomotive Engineers v. Chicago & North Western Ry.*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963). In that case, the court did conclude that Section 11341(a)'s predecessor relieved a carrier of its Railway Labor Act obligations (314 F.2d at 432), but the facts relied upon by the court substantially lessen its value to petitioners in this case. In *Chicago & North Western*, the Eighth Circuit was faced with the question of whether the BLE was bound by an agreement which its representative had entered into to protect employees affected by the ICC approved transaction. 314 F.2d at 427. That agreement provided for arbitration of seniority integration disputes. *Id.* The BLE asserted that the arbitration provision of that agreement did not apply, but rather, it contended, the carriers had to comply with the Railway Labor Act's major dispute procedures to resolve the integration dispute. 314 F.2d at 428. Relying upon those facts (314 F.2d at 434), the Eighth Circuit held that the BLE was barred by what is now Section 11341(a) from asserting that the Railway Labor Act prohibited enforcement of the arbitration provision to which it had agreed. 314 F.2d at 433. In reaching that conclusion, the Court noted that: "In effect the stipulation [*i.e.*, protective agreement]

provides substantially the same machinery for arbitration that exists under § 7 of the Railway Labor Act . . . ." *Id.* That same observation is not true in this case.

Disregarding its pre-1983 consistent view of its limited role over labor relations, petitioner ICC contends that the employee protective provisions imposed under 49 U.S.C. § 11347 "ensure that inability of the parties to agree upon changes in working conditions necessary to Commission-approved transactions will not prevent the approved transaction from being implemented." ICC Br. at 34 n.21. That result is achieved, petitioners contend, by the fact that in their opinion the protective conditions provide for the compulsory arbitration of changes in rules and working conditions which the carrier wishes to make in implementing the operational changes associated with a transaction approved by the ICC. ICC Br. at 37-38 n.24. Besides being a very recent position of the ICC (*see, In re Norfolk & Western Ry., et al.*, Arbitration under Art. 1, § 4 of *New York Dock* conditions (N.H. Zumas, Referee) (a copy of that arbitration award is reproduced hereto as Appendix A)), that view of the ICC's authority over labor relations is erroneous and graphically shows the error of the Commission's construction of its authority under Section 11341(a).[23]

In the ninety-eight years that Congress has been regulating rail labor relations, Congress has refused to compel the arbitration of major disputes. Indeed, Section 7, First of the Railway Labor Act, 45 U.S.C. § 157, First provides: "That the failure or refusal of either party to submit a controversy [over rates of pay, rules, or working conditions] to arbitration shall

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[23] As the ICC has explained before, employee protective conditions are imposed on *carriers* and not employees. Those conditions, the UTU submits, supplement existing employee rights and give rail employees on one carrier involved in a transaction the right to require other carriers to bargain with them over the selection of forces. This cross-carrier bargaining right does not exist under the Railway Labor Act. *Central Vermont Ry. v. BMWE*, D.C. Cir. No. 86-5245, decided May 14, 1986, opinion issued June 27, 1986. If rail labor exercises that cross-carrier bargaining right, it does so with the knowledge that disputes over the terms of the selection of forces agreement unresolved by negotiation must be arbitrated. Respondent UTU submits that until this case, it was well recognized that such an arbitration could not modify existing agreements. Appendix A at 16a.

not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act or otherwise." Also, Congress has concluded that in order to encourage compromise, which is inevitably necessary to reach an agreement, neither rail management nor labor can change the status quo during the negotiation and mediation phases of the compulsory bargaining. 45 U.S.C. §§ 152, Seventh, 155, First and 156. Those status quo requirements are, as this Court has stated, central to the design of this labor statute. *Detroit & Toledo Shore Line R.R. v. UTU,* 396 U.S. 142, 150 (1969). As this Court has explained:

> The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them. The national interest expressed by those Acts is not primarily in the working conditions as such. So far as the Act itself is concerned, these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions. The federal interest that is fostered is to see that disagreement about conditions does not reach the point of interfering with interstate commerce . . . .

Terminal Railroad Assoc. v. Brotherhood of Railroad Trainmen, 318 U.S. 1, 6 (1943) (footnote omitted).

Whether judged by Section 11341(a) or by general conflict of laws principles, it is clear that the Interstate Commerce Act does not conflict with the Railway Labor Act, for the goals of both are compatible. As this Court has stated before, repeals by implications "are not favored" (*e.g., Morton v. Mancari,* 417 U.S. 535, 549 (1974)) and will not be found to exist unless the intention of the legislature to repeal is clear and manifest. *Watt v. Alaska, supra,* 451 U.S. at 267. Indeed, federal courts "must read the statutes to give effect to each if we can do so while preserving their sense and purpose." *Id.* Here, petitioners have made no attempt to read the Interstate Commerce Act's

consolidation provisions together with the commands of the Railway Labor Act, but the fact that the two Acts have existed side-by-side without a conflict for more than fifty years prior to this case shows that the two Acts can be read so as to give effect to each.

Imposed changes, such as those mandated in this case by the ICC, or even arbitrated changes imposed over the objections of employees as occurred in the arbitration award attached to this brief as Appendix B (*In re Norfolk & Western Ry., et al.*, Arbitration under Art. 1, § 4 *Mendocino Coast* conditions (R.J. Ables, Referee)), are contrary to the Railway Labor Act. More important, they bring with them a threat to uninterrupted commerce and a "loss of employee morale when the demands of justice are ignored." *United States v. Lowden, supra*, 308 U.S. at 236. Both results are contrary to the goals of the Interstate Commerce Act. *See, ICC v. Railway Labor Executives' Assoc., supra*, 315 U.S. at 377. As this Court has explained before in a comparable situation:

> The Commission acts in a most delicate area here [*i.e.*, a strike situation where it was asked to certify a replacement motor carrier], because whatever it does affirmatively . . . may have important consequences upon the collective bargaining processes between the union and the employer. The policies of the Interstate Commerce Act and the labor act necessarily must be accommodated, one to the other.

Burlington Truck Lines, Inc. v. United States, supra, 371 U.S. at 172-73. Unfortunately, by concentrating solely on a speedy implementation of all aspects of an approved transaction, and by ignoring the limits of its jurisidiction, the ICC has made no attempt to accommodate the policies of the two statutes.

B. Section 11347 Prohibits The ICC From Relieving A Carrier Of Its Railway Labor Act Obligations

Whatever questions may have existed as to whether the ICC had jurisdiction over labor relations matters were laid to rest by the 1976 amendments to the Interstate Commerce Act. In 1976, Congress made extensive revisions to the Interstate

Commerce Act in the Railroad Revitalization and Regulatory Reform Act of 1976 [hereinafter, "4R Act"], Pub. L. No. 94-210, 90 Stat. 31, including an amendment to what is now Section 11347 to require the Commission to increase the levels of protection which it routinely imposed in consolidation cases.[24] 4R Act, § 402(a), 90 Stat. at 62. That amendment provided that the arrangement which the ICC was to impose in all consolidation approvals "shall contain provisions no less protective of the interests of employees than those heretofore imposed pursuant to this subdivision and those established pursuant to section 405 of the Rail Passenger Service Act (45 U.S.C. 565)." 90 Stat. at 62.

As it now reads, Section 11347 requires the ICC to condition *all* rail consolidation approval orders by requiring the applicants "to provide a fair arrangement at least as protective of the interest of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 565 of title 45." 49 U.S.C. § 11347. According to the ICC, the employee protective provisions imposed in 1982 provide these minimum levels of protection. Since Section 11341(a) immunizes carriers from federal laws "insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission" (Section 7 of Transportation Act of 1940, adding 49 U.S.C. § 5(11), 54 Stat. at 908), it follows that Section 11341(a) cannot relieve carriers of whatever obligations are imposed upon them pursuant to Section 11347.

Those obligations include the requirement in Article 1, Section 4 of the current employee protective conditions that rail carriers participating in a transaction, which may cause the rearrangement of forces, shall give advance notice of the "transaction"—*i.e.*, the acquisition of trackage rights or, in purchase, merger and control cases, any action taken pursuant to authorization of ICC (Art. 1, § 1(a), 354 I.C.C. at 610; 360

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[24] Congress also made employee protection mandatory in abandonment cases under what is now 49 U.S.C. § 10903 and required the same levels of protection as it added to the consolidation provisions. 4R Act, § 802, 90 Stat. at 127-28.

I.C.C. at 84)—and, if requested, must negotiate an agreement to "provide for the selection of forces from all employees involved on basis accepted as appropriate for application in the particular case . . . ." Art. 1, § 4 of *Norfolk & Western* conditions, 354 I.C.C. at 610. As the Commission's decision in the *Southern Ry.—Control, supra,* case shows, that notice must be given to employees of all carriers involved in the transaction. A failure to give that notice has devastating effects on the employees excluded, and, thus, the notice and subsequent negotiation are an "indispensable prerequisite" to a valid order of approval under the consolidation provisions of the Act. 331 I.C.C. at 166. Moreover, the 1976 amendments require the imposition of those provisions established under Section 405(b) of the Rail Passenger Service Act, 45 U.S.C. § 565(b) to "preserv[e] . . . rights, privileges, and benefits . . . to such employees under existing collective-bargaining agreements or otherwise; [and] (2) [to] continu[e] . . . collective-bargaining rights . . . ." Article 1, Section 2 of the employee protective conditions implements that requirement by providing that:

> The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits . . . of railroads' employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

Art. 1, § 2 of *Norfolk & Western* Conditions, 354 I.C.C. at 610. Both of those requirements (*i.e.*, Art. 1, §§ 2 and 4 of the *Norfolk & Western* conditions) are derived from, and indeed are virtually identical to, provisions established pursuant to Section 405 of the Rail Passenger Service Act—*i.e.*, the Appendix C-1 conditions—and are, thus, minimum levels of protection which are required to be imposed as a condition on any consolidation appoval. *E.g., Railway Labor Executives' Assoc. v. United States, supra,* 675 F.2d at 1251; *New York Dock Ry. v. United States, supra,* 609 F.2d at 94; *accord, Railway Labor Executives' Assoc. v. United States,* 339 U.S. 142 (1950).

As the unambiguous language of Article 1, Section 2 of the employee protective conditions shows, railroads involved in a

transaction upon which that condition has been imposed must implement the approved transaction in such a manner so as to preserve existing collective bargaining rights and agreements of employees, including employee rights under the Railway Labor Act. Although railroads have urged implementing agreement arbitrators since the passage of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, to modify existing collective bargaining agreements, those arbitrators, until 1983, had almost uniformly concluded that they did not have such jurisdiction, mainly because of Article 1, Section 2 of the employee protective conditions. *E.g.*, App. A at 16a. That construction of Article 1, Section 2 is clearly consistent with its "legislative history," for as the *amici* have shown, the statutory predicate for Article 1, Section 2—*i.e.*, 45 U.S.C. § 565(b)(1) and (2)—was derived from Section 13(c) of the Urban Mass Transportation Act of 1964, as amended, 49 U.S.C. § 1609(c). Amici Br. at 27. As the *amici* concedes (*id.*), the purpose of Section 13(c)'s collective bargaining rights requirement was to require the companies involved in a transfer "to preserve" those rights, not to facilitate their abrogation.

In this case, the ICC noted, "standard labor protection conditions generally preserve working conditions and collective bargaining agreements." ICC Decision of October 25, 1983, at 6; ICC App. at 59a. However, the ICC then qualified that correct reading of the protection by stating that:

> The terms of those conditions . . . must be read in conjunction with our decision authorizing the involved transaction and the underlying statutory scheme. To the extent that existing working conditions and collective bargaining agreements conflict with a transaction which we have approved, those conditions and agreements must give way to the implementation of the transaction.

Id. at 59a-60a. That view of the relationship between collective bargaining rights and the effect of an ICC order is clearly based on the Commission's erroneous belief that it has jurisdiction over labor relations matters and that Section 11341(a) operates to relieve a carrier of any Railway Labor Act obligation that might impede implementation of the transaction in the manner

proposed by the carrier. Respondent UTU respectfully submits that the Commission's expansive view of its authority totally fails to recognize that the 1976 amendments to what is now Section 11347 prohibit it from approving any consolidation transaction which the applicants intend to implement in a manner that abrogates collective bargaining rights. Consequently, it is erroneous to assert that collective bargaining rights must give way to implementation of a transaction approved by the Commission.

Petitioner MKT and *amici* argue that if Congress had intended the 4R Act to have such a major intent on the ICC's jurisdiction over consolidations as respondent UTU urges, there would have been some reference to that impact in the Act's legislative history. Since, they believe, Congress was totally silent on this issue, Congress, they assert, could not have intended such a limitation on the ICC's jurisdiction. *E.g.*, Amici Br. at 26. *Amici* and petitioner MKT, however, have approached Congress' "silence" in 1976 with an erroneous view of pre-1976 law, for they ignore the fact that the ICC's 1967 *Southern Ry.—Control* decision represented the ICC's longstanding interpretation of its authority, and they fail to recognize that prior to 1983 rail labor had never been forced to arbitrate work rule changes as has occurred since the ICC's decision in this case. *See*, App. B. As this Court has noted before: "In these circumstances, congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974).

Here, however, Congress was not totally silent, for it was urged by rail labor to require the ICC to improve its protective conditions (*e.g.*, Railroads—1975: *Hearings on S.793, et al., Before Senate Committee on Commerce*, 94th Congress., 1st Sess. at 1105 (1975) (Statement of William G. Mahoney)), and it granted rail labor's request because: "If we are to have a fair rationalization of the rail system in the United States, then adequate protection of jobs must be afforded those who choose a career in railroad jobs." H. Rpt. No. 94-725, 94th Cong., 1st Sess. at 75 (1975) (commenting on amendment to abandonment provisions). The amendments which Congress enacted in

1976 clearly required all subsequent ICC protective conditions to preserve and to continue collective bargaining rights. Congress' intent could not have been clearer.

On the other hand, if Congress intended in 1976 or 1940 to give the ICC jurisdiction over labor relations matters and to require compulsory arbitration or the unilateral abrogation of rules and agreements, that would have been a major change in policy which should require a clear expression of congressional intent before it can be implied. *Watt v. Alaska, supra,* 451 U.S. at 270-71; *Edmonds v. Compagnie Generale Transatl.,* 443 U.S. 256, 266-67 (1979). Since no such expression of congressional intent to abandon almost a century old policy of not compelling arbitration of major disputes can be found in the numerous Acts of Congress modifying the Interstate Commerce Act, it is improper to conclude, as petitioners do, that Congress has given the ICC such an abhorent power.

CONCLUSION

For the reasons set forth herein, the judgment of the court of appeals should be affirmed and this case should be remanded to the ICC with instructions to give full recognition to the requirements of 49 U.S.C. § 11347.

Respectfully submitted,

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Date: August 15, 1986

APPENDIX A

In the Matter of Arbitration Between

NORFOLK AND WESTERN RAILWAY COMPANY

and

ILLINOIS TERMINAL RAILROAD COMPANY

vs.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

and

UNITED TRANSPORTATION UNION

Finance Docket 29455

OPINION AND AWARD

Background

This is an arbitration proceeding pursuant to the provisions of the *New York Dock* Labor Protective Conditions (under Article I, Section 4), imposed by the Interstate Commerce Commission in Finance Docket Number 29455.

Hearing was held at St. Louis, Missouri on November 11, 1981, at which time oral argument was heard and exhibits offered and made part of the record.

In addition to the submissions presented at the hearing, the parties agreed to file post-hearing submissions and reply submissions. The post-hearing submissions of Carriers and UTU were received on November 25, 1981. Because of an incorrect mailing address, the post-hearing submission of BLE was not received until December 2, 1981.

Carriers were represented by R. D. Kidwell, System Director Labor Relations and M. M. Lucente, Esq. The UTU was represented by Vice Presidents C. L. Caldwell and H. G. Kenyon, and W. G. Mahoney, Esq. The BLE was represented by Vice President E. E. Blakeslee.

Statement of the Case

On June 22, 1981, the Interstate Commerce Commission (ICC) authorized the acquisition of the Illinois Terminal Railroad Company (IT) by the Norfolk & Western Railway Company (N & W). The acquisition authorization was conditioned upon the N & W's agreement to accept the provisions of the *New York Dock II (New York Dock Railway-Control—Brooklyn Eastern District,* 360 I. C. C. 60 (1979).

Article I, Section 4 of the New York Dock Conditions require that subsequent to Carriers' serving a 90 day notice of the intended transaction, the parties endeavor to negotiate an implementing agreement under which the employees will work after the implementation of the consolidation.

On July 29, 1981, Carriers' served the required notice on the Brotherhood of Locomotive Engineers (BLE) and the United Transportation Union (UTU) of their intent to "unify, coordinate and/or consolidate their respective operations" on or after November 1, 1981. After serving the requisite notice, the parties met on several occasions in an effort to reach agreement under which the employees would work upon implementation of the consolidation. The parties were unable to reach agreement, and Carriers then advised the Organizations that all proposals made (except Carriers' original proposal) were withdrawn; and that Carriers were invoking arbitration pursuant to Article I, Section 4 of the New York Dock Conditions.

The pertinent portions of the July 29, 1981 Notice by Carriers read:

> "As a result of the Carriers' excercise of the above-described authority, it is intended to unify, coordinate and/or consolidate facilities used and operations and services presently performed separately by Illinois Terminal Railroad Company and Norfolk & Western Railway Company.
>
> It is intended that all train and engine service employees represented by the Brotherhood of Locomotive Engineers or the United Transportation Union will, on the effective date of the unification, coordina-

tion and/or consolidation, be integrated into an appropriate single seniority roster and that such employees will be employees of NW and will be available to perform service on a coordinated basis subject to currently applicable NW (former Wabash) agreements."

Carrier's initial Implementing Agreement dated August 31, 1981, was a proposal involving BLE only, and excluded UTU. That Agreement read in pertinent part:

"Article I
Section 1

(a) Except as provided as in (b) below, the names and seniority dates of the active IT engineers (all who are working as engineer or hostler either extra or regular or those who stand to work as such on the effective date of this Agreement) will be dovetailed with the active NW engineers (all who are working as engineer, fireman or hostler either extra or regular or those who stand to work as such on the effective date of this Agreement) on St. Louis Terminal. Thereafter, the inactive (not working or do not stand to work as engineer, fireman or hostler) IT engineers names will be dovetailed with the inactive NW engineers on St. Louis Terminal and the combined inactive group will then be placed on the bottom of the previously dovetailed active group of engineers. This will constitute the new NW consolidated St. Louis Terminal Roster.

(b) IT engineers electing not to have their names and seniority dates dovetailed into the St. Louis Terminal Roster will advise the Carrier within ten (10) days of the effective date of this Agreement of the NW's Decatur Division road or yard roster, excluding roster of Forrest District and Hannible-Quincy Yards, on which they elect to have their names and seniority dates dovetailed, and their names will be removed from said St. Louis Terminal Roster.

Article II—Schedule Agreement

Upon implementation of this Agreement, all engineers in the consolidated seniority districts will be subject to the applicable Schedule Agreement in effect on the former Wabash, except as specifically provided herein.

* * * *

Article XIV

This Agreement, while bearing the signature of the United Transportation Union General Chairman who formerly represented engineers on the former Illnois Terminal Railroad Company is hereafter recognized as an agreement between Norfolk and Western Railway Company and Brotherhood of Locomotive Engineers only."

In summary, Carriers' proposed Implementing Agreement would:

(1) Dovetail the seniority of employees on a two-tiered basis (active with active, inactive with inactive)

(2) Place the IT employees under the N & W (Wabash) schedule agreement, and

(3) Transfer the representation of the IT employees from UTU to BLE.[1]

Issues To Be Resolved

The parties are in agreement that there are two essential issues to be resolved in this dispute:

1. Does this Board have the authority under New York Dock Conditions to change the provisions of existing

[1] Carriers reject the third contention, asserting that the Board is not being asked to alter representation rights. Carriers state: "The Illinois Terminal engineers represented by UTU constitute a minority of the employees of the craft of engineers in the post-consolidation NW system. As such, UTU must apply for certification to represent engineers of the consolidated NW system, regardless of which agreements remain in effect."

collective bargaining agreement, i.e. the authority to terminate the IT—UTU agreement and remove the IT engineers from UTU's jurisdiction.

2. Is the Carriers' proposal to dovetail seniority rosters (active with active and furloughed with furloughed) a fair and equitable method of combining the N & W—IT work of locomotive engineers.

Position of the Carriers

Carriers argue that the consolidation proposal, particularly the provision for the placement of all employees under one N & W schedule agreement, is the only proposal that will effectively achieve the purpose and intent of the ICC order. Otherwise, Carriers argue, N & W will have to live indefinitely with two separate and distinct work forces—"One still operating under N & W rosters and rules and one still dependent on IT's rosters and rules even though IT and its operations have disappeared."

Carriers argue that the arbitrator's authority under Section 4 of the *New York Dock* Conditions includes the power to change the provisions of existing collective bargaining agreements. Carriers assert that the arbitrator's authority is consistent with the principal enunciated by the ICC in *Southern Railway—Control-Central of Georgia*, 331 ICC 165: "That the very purpose of the first and landmark set of merger protection conditions—the Washington Job Protection Agreement (WJPA)—was to provide a basis for 'superseding' existing agreements in order 'to avoid . . . the prohibitions against transfering work from one railroad to another contained in collective bargaining agreements . . .' While Carriers agree that the ICC in *Southern Railway-Control* that agreements were not automatically cancelled by a merger order, they argue that the ICC "prescribed Sections 4 and 5 of the Washington Job Protection Agreement as conditions of the merger in order to provide a mechanism by which agreements could be changed," and that Sections 4 and 5 (which formed the basis for Section 4 of the *New York Dock Conditions*) "required Carriers and labor organizations to negotiate over 'each plan of coordination

which results in the rearrangement of forces' "and that in the event that the parties failed to agree, both Section 5 of the Washington Job Protection Agreement and Section 4 of *New York Dock*, a 'superseding process' through arbitration."

Carriers refer to the New York Dock decision[2] (Which expressly refers to the consolidation of seniority rosters as a change that is subject to its procedures), and quotes the Commission's statement that "any future related action taken pursuant to an approval (i.e., consolidation of rosters as a result of the control) will require full and literal compliance with the conditions," and urge that "where seniority rosters and work are consolidated, it necessarily follows that rules *must* be consolidated and made uniform as well. Otherwise, the absurd situation of employees working at the *same* time on the *same* crew under a different set of work rules would result."

(Underscoring provided.)

Carriers reject the Organizations' contention that Section 2 of the *New York Dock* Conditions does not allow changes in agreement through the arbitration process. Section 2 reads:

> "The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes."

Carriers argue that the arbitration process set forth in Section 4 is an integral part of the collective bargaining process that results eventually in an agreement voluntarily negotiated between the parties or an agreement prescribed by arbitration. Even though arbitration might be required, this does not change the character of the ultimate product, namely, a collective bargaining agreement; thus meeting the requirements of Section 2 of the *New York Dock* Conditions with respect to the procedures for changing existing collective bargaining agreements. In support of their argument, Carriers rely on the

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[2] *New York Dock Railway-Control-Brooklyn E.D.T.* 360 ICC 60 (1979).

Seidenberg Award involving the Yardmasters, Conrail and the Detroit Terminal Company.

Finally, Carriers argue that the consolidation of seniority rosters and the placement of the N & W and IT work forces under the N & W Wabash agreements are necessary to carry out the transaction authorized by the ICC. Without a consolidation of seniority rosters and a unification of schedule agreements, Carriers contend they could not accomplish the central features of the application approved by the ICC. Carrier states: "IT positions *will not* become NW positions and IT'S operations *will not* be fully consolidated with NW's operations. Instead, an inconsistent and obstructive aspect of IT's former operations will survive and impede the consolidation. NW will be forced to manage the physically consolidated NW-IT properties with an unconsolidated NW-IT work force."

With respect to the question of the method of consolidating the seniority rosters, Carriers contend that the dovetailing as proposed is the most fair and equitable method of putting the rosters together. Carriers assert:

> "It would tend to keep the same employees working subsequent to consolidation that are working today. Furthermore, those presently active engineers who possibly would be furloughed subsequent to consolidation through a reduction in assignments would be the first group returned to active status by atrition of senior engineers or an increase in total number of assignments."

Carriers reject the "equity proposals" as being too difficult to administer and creating confusion and ill will among the involved employees.

Position of the Organizations

Both the UTU and BLE argue that an arbitrator does not have the authority to terminate the IT-UTU Agreement and place the IT engineers under the N & W-BLE (Wabash) Agreement. The Organizations argue that the arbitrator's jurisdiction under Article I, Section 4 of the *New York Dock* Conditions is limited to determining the implementing agreement provisions having direct application to the basic employee

protections arising from the immediate transaction and to the selection and assignments of employees affected by the transaction. Unless such jurisdiction is specifically and unequivocally given, an arbitrator may not write an collective bargaining agreement for the parties.

The Organizations argue that the arbitrators authority in this case, arising from Article I, Section 4 of the *New York Dock Conditions,* is limited. Section 4 requires "each railroad contemplating a transaction which is subject to [the New York Dock] conditions and may cause the dismissal or displacement of any employees, or rearrangement of forces" to give advance written notice thereof to the employees and their bargaining agents which notice must "contain a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes." Before Carriers can consummate the transaction, the parties are required to negotiate an "agreement with respect to the application of the terms and conditions of this appendix", (Appendix III to the Commission's Order in *New York Dock*) and further providing "for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case." Thus, if the parties cannot agree upon the employee protections contained in Appendix III or the basis for the selection of work forces, the dispute may be submitted to arbitration for adjustment. The limited nature of an arbitrator's authority is further confirmed by Section 2 of the *New York Dock* conditions. In Section 2, the Commission preserves and continues the application of existing collective bargaining agreements when it states:

> "The rates of pay, rules, working conditions and all collective bargaining and other rights, priveleges and benefits (including continuation of pension rights and benefits) of the railroads employees under applicable laws and/or existing collective bargaining agreements or otherwise *shall be preserved unless changed by future collective bargaining or applicable statutes.*" (Underscoring added)

When Section 4 is read in conjunction with Section 2, the Organizations argue, "the limitation on an arbitrator's authority is placed beyond serious argument."

The Organizations argue further that, in addition to the preservation of existing agreements found under the provisions of Section 2 of the *New York Dock Conditions,* Sections 2, Seventh and 6 of the Railway Labor Act prohibit the Carriers from abolishing bargaining agreements; and that a collective bargaining agreement subject to the provisions of the Railway Labor Act cannot be revised except through the procedures of a Section 6 Notice and the other mandatory provisions of the Railway Labor Act. Since the Organizations have not agreed to any changes in the working agreements of the employees they represent or to make such changes an issue in this dispute, it is contended that this arbitrator is not authorized to adopt the Carriers proposal that the UTU-represented employees be placed under the Wabash schedule agreement; rather, they contend, this arbitrator is limited to imposing an Implementing Agreement that provides the basic protections and a "fair and equitable method for the selection of forces to perform the work involved."

The Organizations further argue that neither judicial decisions, ICC decisions, nor arbitration decisions support the Carriers' argument that the Interstate Commerce Act gives the ICC the authority to supersede collective bargaining agreements and change representation of railroad employees by its approval of a railroad acquisition. The Organizations further argue that even if the ICC had such authority as claimed by Carriers, it did not exercise such authority in this case.

With respect to the question of the method of consolidating the seniority rosters, the Organizations take different positions.

The BLE is opposed to dovetailing rosters on the basis proposed by Carriers contending that such method is inequitable and would do violence to the basic concept of seniority. The BLE urges that the seniority rosters for the craft of locomotive engineers on the combined Carrier be consolidated by dovetailing the rosters for locomotive engineers on the N & W and the IT on the basis of entry into the craft of fireman

and engine service without penalizing senior employees presently furloughed by the recession. The BLE opposes the effort by Carriers to consolidate the engineers' rosters by promotion dates after seperating the engineers into so-called active and inactive categories. The Carriers' proposal, BLE contends, creates runarounds of senior engineers by junior engineers, and penalizes senior employees on furiough and those persons who may be on sick leave or in an inactive status through no choice of their own; and is further inequitable because it does not take into consideration and employee's length of service with his orginal employer, thereby failing to consider his work contribution, disregards the different hiring and promotion patterns and practices on the two Carriers, and serves to benefit the employee working for an inefficient Carrier that has not already made economies in operation as compared with efforts to economize on the other Carrier. The BLE further oppose the UTU proposal (suggesting that the N & W and IT rosters be combined on the basis of a work equity principal) asserting that the UTU proposal "suffers from much of the same criticism of the Carriers' proposal" in that it "over-looks the foundational premise of seniority integration to first look to the employees length of service with his original employer," and to the prior seniority rights of employees to service on their former seniority district or territory. Additionally, the BLE argues, that there is little if any data upon which to adequately consider and apply an equity formula in this case. The BLE suggests that any figures obtainable are "tainted" and cannot serve as the basis for integrating seniority rosters in a fair and equitable manner. The exclusive engine hour formula proposed by UTU could benefit the IT engineers and penalize N & W engineers because they were employees of a more efficient Carrier; and that an equity formula such as that proposed by UTU fails to take into account various factors including number of employees, hours worked, earnings, mileage, car count and tons carried. Since there is little uniformity of these factors between the two Carriers, the formula suggested by the UTU must be "disregarded as impracticable and inequitable, and other considerations must be used in combining the rosters."

The UTU takes the position that its "work equity" proposal is the most equitable because it recognizes the increase in

work and job opportunities for all employees contributed to the combined operation by IT employees. Since IT employees are comparatively junior, the straight dovetailing by seniority date method would result in the IT work being performed by N & W employees. The UTU further argues that placing all presently furloughed N & W and IT employees in a separate furlough roster would eliminate all future job opportunities for those employees even though some of them may be senior to employees on the active roster.

The UTU urges that the integration of rosters be made on the basis of the existing 1972 St. Louis Terminal Agreement; and that the difficulties in working out the terms of that Agreement as allegedly experienced by the N & W could be obviated by renegotiating the terms of that Agreement. Otherwise, the UTU argues, "to sanction implementation of such a [dovetailing] plan would not only violate the provisions of the Railway Labor Act and *NYD* but could in no sense be considered the 'fair and equitable arrangement to protect the interests of the railroad employees affected' ".

Findings and Conclusions

Issue No. 1

After careful examination of the relevant statutory provisions and their legislative history, judicial and arbitral decisions, and the ICC imposed Conditions, this Arbitrator is compelled to conclude that he has no authority to terminate the IT Agreement and place IT employees under the N & W (Wabash) Agreements.

The ICC, in its decision of June 22, 1981, stated:

> "Our approval of NW's acquisition of IT must, nonetheless be conditioned on NW's agreement to provide 'a fair arrangement at least as protective of the interests of employees who are affected by the transaction' as the labor protective provisions imposed in control proceedings prior to February 5, 1976. 49USC § 11347. In *New York Dock RY.—Control-Brooklyn Eastern Dist.* 360 ICC 60

(1979) (*New York Dock Aff'd Sub. Nom. New York Dock RY.* v. *United States,* 609 F. 2D 83 (Second Cir. 1979), we described the minimum protection to be afforded employees under that statute in the absence of a voluntarily negotiated agreement. . . ."

Article I, Section 4 of the *New York Dock* conditions (Appendix III) provides in pertinent part:

"Each railroad contemplating a transaction which is subject to these conditions and may *cause the dismissal or displacement of any employees, or rearrangement of forces,* shall give at least ninety (90) written notice of such intended transaction . . . such notice shall contain a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes. Prior to consummation the parties shall negotiate in the following manner.

Within five (5) days from the date of receipt of notice, at the request of either the railroad or representatives of such interested employees, a place shall be selected to hold negotiations for the purpose of reaching agreement *with respect to application of the terms and conditions of this Appendix,* and these negotiations shall commence immediately thereafter and continue for at least thrity (30) days. Each transaction which may result in a dismissal or displacement of employees or rearrangement of forces, *shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this Section 4. . . .*" (Underscoring added)

Section 2 of Appendix III provides:

"The rates of pay, rules, working conditions and all collective bargaining and other rights, priveleges and benefits (including continuation of pension rights and

> benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved *unless changed by future collective bargaining agreements or applicable statutes.*" (Underscoring added)

Title 49 USC § 11347 of the Revised Interstate Commerce Act (a recodification of Section 5 (2)(f) applicable at the time the *New York Dock* matter was pending before the ICC), provides:

> "When a rail carrier is involved in a transaction for which approval is sought under Section 11344 and 11345 or Section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interests of employees who are affected by the transaction as the terms imposed under this Section before February 5, 1976, and the terms established under Section 565 of title 45. Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period)."

Prior to February 5, 1976, the Commission developed a series of standard employee protective conditions imposed by the ICC in approving a transaction involving one or more railroads under Section 5 (2) of the Interstate Commerce Act.[3] All of these job protection agreements were patterned after the Washington Job Protection Agreements of 1936 (WJPA.)

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[3] The principal sets of conditions imposed by the ICC under former Section 5(2)(f) in Stock Control cases were the "*New Orleans Conditions*" and the "*Southern—Central of Georgia Conditions.*"

Section 4 of the WJPA requires that employees be given 90 days' notice of a coordination, and that such notice "shall contain a full and adequate statement of the proposed changes to be effected by such conditions, including an estimate of the number of employees of each class affected by the intended changes." Section 5 of WJPA states:

> "Each plan of coordination which results in the displacement of employees or rearrangement of forces shall provide for the selection of forces from the employees of all the carriers involved on basis accepted as appropriate for application in the particular case; and any assignment of employees made necessary by a coordination shall be made on the basis of an agreement between the carriers and the organizations of the employees affected, parties hereto. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with Section 13."

The *New York Dock Conditions* are derived from the Washington Job Protection Agreement, the New Orleans Conditions, and Appendix C-1.[4] In formulating the *New York Dock* conditions, the ICC selected the most favorable of the provisions contained in these conditions. The *New York Dock* conditions included a provision not contained in the WJPA, and that was Section 2, quoted above.

Carriers argue that this Arbitrator has the authority *and the duty* to prescribe N & W's proposal, and that this Arbitrator's power is not constrained in his authority to prescribe the terms of any "rearrangement of forces." Since the Commissions authority is exclusive and plenary under the provisions of Section 11341 of the Interstate Commerce Act, the Arbitrator's authority is derived from, and is an extension of, such exclusive and plenary authority. Carriers argue that the Commission's order authorizing the purchase and consolidation of IT by N & W and requiring arbitration of disputes involving the

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[4] Protective provisions promulgated by the Secretary of Labor under the Rail Passenger Service Act of 1970.

"rearrangement of forces" supersedes any other agreements or laws, including the Railway Labor Act.[5]

Central to the position of the Carriers is the question of whether the negotiation and arbitration provisions of employee protection conditions in consolidation cases provide a mechanism that supersedes Railway Labor Act requirements and permits an Arbitrator to transfer work and employees despite any such prohibitions contained in collective bargaining agreements pursuant to the Railway Labor Act.

This Arbitrator is of the opinion that the question must be answered in the negative.

An Arbitrator's authority under Article I, Section 4 of *New York Dock*, where the parties are unable to reach agreement, is limited to the determination of employee protections contained in Appendix III, and to provide a basis for the selection of work forces of the employees involved. Article I, Section 4 does not give an Arbitrator authority to alter rates of pay, rules, working conditions, or any other collectively bargained rights or benefits that are "preserved" under Section 2. It follows that an Arbitrator is not empowered, without mutual agreement of the parties, to substitute, modify or terminate agreement negotiated pursuant to the provisions of the Railway Labor Act. Carrier's contention that the arbitration process (provided in Section 4) is an integral part of the collective bargaining process, and as such, an agreement may be changed (as provided in Section 2) either by negotiation by the parties or by an arbitration award is, in this Arbitrator's view, based on the erroneous premise that the ICC mandated involuntary "interest arbitration" in contravention of the provisions of the Railway Labor Act. No persuasive authority has been presented that supports or warrants such a far-reaching result.

Contrary to the contention of Carriers, the ICC in *Southern Railway Company-Control-Central of Georgia Railway* Company (Finance Docket No. 21400, 331 ICC 151) does not, in the opinion of this Arbitrator, support the position of Carriers.

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[5] Sections 2 Seventh, and 6 of the Railway Labor Act prohibit a Carrier from unilaterally abolishing or revising a bargaining agreement.

A reading of the ICC decision in *Central of Georgia* warrants the finding that the ICC, notwithstanding its plenary and exclusive jurisdiction in these matters, recognizes the need to preserve the rights of employees under their collective bargaining agreements; and that those rights may not be abrogated by arbitral fiat.

At page 169, the Commission states:

> "[T]he rights of railroad employees under their collective bargaining agreements, under the Washington Agreement and under the protective conditions imposed upon the Carriers under Section 5 (2)(f) are independent, seperate, and distinct rights. *We have historically recognized the independent nature of those rights and have distinguished the employee rights derived from collective bargaining agreements from those derived from conditions which we have imposed upon carriers.* The rights under the former are based upon private contracts; those under the latter stem from our statutory duty to protect employees."

The Commission goes on to state, at page 170:

> "Of equal importance, this contention of applicants is demonstrably erroneous. By its terms, Section 5 (11) applies only to antitrust and other restraints of law from carrying 'into effect the transaction so approved***'. Neither the Washington Agreement nor the specific collective bargaining agreements between these roads and their employees is such a restraint, for indeed Section 5 transactions have been successfully consummated in full compliance with such terms.
>
> * * *
>
> *The designated 'exclusive and plenary power' of the Commission in Section 5 (11) cannot be so broadly construed as to brush aside all laws—be they statutorily created anti-trust laws or voluntary contractual agreements made binding by the force of law."* (Underscoring added)

Further support of this Arbitrator's holding that Carriers are in error when they contend that the ICC's exclusive and plenary authorization of the purchase and acquisition of IT by N & W supersedes any other agreements or the Railway Labor Act, and, by extension, that "an arbitrator has the authority, under the necessary, 'superseding' authority of Section 4 of *New York Dock*, to alter collective bargaining agreements in order to achieve an effective consolidation," Referee Bernstein in *American Railway Supervisors Association et al vs. Southern Railway System* (Docket No. 141) stated the following relative to the WJPA (from which *New York Dock* conditions are derived) and the Railway Labor Act:

> "Section 5(2)(f), enacted in 1940, directs the Interstate Commerce Commission to impose conditions for the protection of employees in merger and other cases. In intent and practice those conditions are much like those of the Washington Agreement. The labor organizations declared at the hearings on the measure that they sought to achieve similar employee protections on railroads which then did not subscribe to the Washington Agreement. Other provisions of the 1940 Act relieved the carriers of the threat of mandatory mergers hanging over their heads from earlier Transportation Acts. In the period preceding enactment in 1940 there was no recalcitrance by railroad labor organizations which arguably required any limitation upon their rules agreements and the job ownership they often were taken to imply; no one contended that the Washington Agreement was inadequate to its tasks. Nothing in the legislative history of Sections 5(2)(f) or 5(11) was presented which even remotely shows an intention by Congress, or anyone else, to abrogate the rules arrangements, including their merger-barring effect and the Washington Agreement's machinery for overcoming them. Indeed, as noted below, the legislation specifically recognizes the desirability and validity of such private arrangements.

Quite clearly Section 5 (11) operates to relieve carriers involved in a merger approved by the ICC of any requirement for State agency approval, the antitrust laws and other Federal, State or municipal law. Although the claim is made that this section reaches so far as to overcome provisions of the Railway Labor Act as applied to the Washington Agreement, the context and pattern of the section suggest otherwise. All of the references are to corporate, antitrust and State and local regulatory laws—there is no hint that labor-management relations are involved. Nothing in the legislative history was brought forward to suggest that a wholesale change in the procedures of the Railway Labor Act for modifying rules agreements—assuredly a fundamental and important change—was intended. Any such endeavor would have meant a major legislative battle on the point; but no such thing occurred. It staggers the imagination that so radical a change was in fact meant and made without anyone noticing at the time. Nor was such an effect necessary as to mergers because the Washington Agreement provided the mechanism to accomplish them.

* * *

The interplay of the Washington Agreement and the Railway Labor Act must be understood. The Agreement was designed to facilitate mergers, consolidations, and the like but on stated conditions (notice, implementing agreement, benefits to those adversely affected). The Railway Labor Act prevents either carriers or unions from making unilateral changes in those agreed provisions; the Agreement also has limits upon the termination of is applicability. Hence when a merger etc. is undertaken before the required steps to end the Agreement are taken this Agreement binds the union to permit the job combinations required by the merger and requires the carriers involved to follow its procedures and accord its benefits. The recognition given the Washington

> Agreement in the last sentence of Section 5(2)(f) indicates that Congress regarded such a private contractural arrangement as harmonious with the ICC power to imposed employee protective conditions. That provision should be read with Section 5(11). The recognition and encouragement thereby accorded the Agreement argues that it is not overridden by Section 5(2)(f) nor is the protection accorded to the Agreement by Section 6 of the Railway Labor Act vitiated."

The Arbitrator has reviewed the awards cited and relied upon by Carriers and, with all due respect for their authors, disagrees with their conclusions.

None of the awards contains any rationale or analysis that would form any justifiable basis for the result reached. These awards are not only not instructive but cannot be considered to have any precedential value. See: *Conrail & Detroit Terminal Company & RYA* (August 13, 1981); *Chesapeake & Ohio Railway & BLE/UTU* (May 12, 1980); and *New York Dock Railway & Brooklyn Eastern District Terminal & BLE* (December 15, 1980.)

The Aribtrator has also reviewed the judicial decisions cited by Carriers, and has found them to be either irrelevant or unpersuasive as to the matters involved in this dispute. None of the cases cited deals directly with the nature and extent of an Arbitrator's authority to alter or invalidate negotiated bargaining agreements under the circumstances presented.

The Arbitrator is satisfied, considering all of the circumstances, that the "work equity" proposal of the UTU is not as equitable over-all as the method proposed by BLE and agreed to by the Carriers.

* * *

Based on the foregoing, the Arbitrator renders the following:

AWARD

1. The Arbitrator is not empowered, without specific authority and mutual agreement by the parties, to substitute, modify or abrogate a collective

bargaining agreement (or any provisions thereof.) There is, therefore, no jurisdiction to terminate the IT Agreement and place IT employees under the N & W (Wabash) Agreements.

2. The parties are directed and ordered to consolidate the seniority rosters for the craft of locomotive engineers on the combined Carrier on the basis of date of entry into the craft of firemen and engine service without differentiating between active and furloughed employees; and the parties should execute any agreement necessary to carry out the direction and order of this paragraph of the Award.

NICHOLAS H. ZUMAS

Nicholas H. Zumas, Arbitrator

Date: February 1, 1982

APPENDIX B

In The Matter Of Arbitration Between:

NORFOLK AND WESTERN RAILWAY COMPANY

INTERSTATE RAILROAD COMPANY, and

SOUTHERN RAILWAY COMPANY

and

TRAINMEN AND CONDUCTORS
Represented by the United
Transportation Union

Arbitration Pursuant to Action By the National Mediation Board and Notice of the Interstate Commerce Commission in Finance Docket Number 30582 (Sub-No. 1)

Arbitration Panel:	Robert J. Ables, Neutral Referee, Washington, D. C. David N. Ray, Carrier Member, Director, Labor Relations, Southern Railway Company L. W. Swert, Employee Member, United Transportation Union, Vice President
Appearing For The Carriers:	Jeffrey S. Berlin, Esq., Washington, D. C. Russell E. Pommer, Esq., Washington, D. C. William P. Stallsmith, Jr., Esq., Norfolk, Virginia

Also Present or Testifying for The Carriers:	T. E. Gurley, General Manager, Eastern Region, N & W Robert S. Spenski, Assistant Vice President, Labor Relations, Southern E. M. Martin, Regional Director, Labor Relations, N & W J. R. Binau, Assistant Director, Labor Relations, Southern K. J. O'Brien, Assistant Director, Labor Relations, Southern M. C. Kirchner, Director, Labor Relations, Norfolk Southern
Appearing For The Union:	Clinton J. Miller, III, Esq., United Transportation Union, Assistant General Counsel, Cleveland, Ohio
Also Present or Testifying for The Union:	A. Smith, UTU General Chairman, Southern R. F. Spivey, UTU General Chairman
Proceedings:	Netural referee appointed by the National Mediation Board: June 13, 1985. Pre-hearing briefs received: August 26, 1985. Arbitration hearing: Atlanta, Georgia; August 28, 1985. Transcript received: September 3, 1985. Post-hearing briefs received: September 9, 1985.
Date of Decision:	September 25, 1985.

ARBITRATION AWARD

NORFOLK AND WESTERN RAILWAY COMPANY
INTERSTATE RAILROAD COMPANY
SOUTHERN RAILWAY COMPANY

and

TRAINMEN AND CONDUCTORS Represented By
The United Transportation Union

OPINION

I. JURISDICTION

This dispute between railroads and their employees is another round of an old fight fought on the same battlefield. Each side has had enough victories to encourage it to persist in the contest. Neither side seems to want to change either its strategy or tactics, and neutrals, like arbitrators and judges, have not seemed to be able to make a decision to put the issue to rest. The decision here is not likely to do more.

1. Issue

At issue is the right of railroad employees represented by their labor organization, the United Transportation Union (Union) in this case, to say to their employer railroad(s), the Norfolk and Western Railway Company (N & W), Interstate Railroad Company (Interstate) and Southern Railroad Company (Southern) (Carrier or Carriers), after consolidation authorized by the Interstate Commerce Commission (ICC or Commission), with labor protective conditions that, if pay, rules, working conditions, etc., in an existing collective bargaining agreement would be changed as a result of changes made by the Carrier authorized by the consolidation, such pay, rules, working conditions, etc., can be changed only by further collective bargaining under the provisions of the Railway Labor Act (RLA), and not under the arbitration provisions of the

labor protective conditions specified by the ICC in the event the parties are not able to make an agreement to implement the consolidation.

There is respectable judicial and arbitral authority to support the Union's position that the RLA controls.

There is respectable judicial and arbitral authority to support the Carriers' position that the arbitration provisions control.

2. ICC Conditions

The dispute on this point seems to flow not from any challenge of the right of the ICC to specify labor protective conditions upon authorizing a railroad consolidation (or exempting it from regulation), but from the kind of such conditions specified.

Despite a record of proceedings approaching those in hotly contested cases appealed to a U. S. Court of Appeals,[1] it is not clear why the ICC persists in specifying labor protective conditions that perpetuate the problem.

a. Section 2 Conditions

On the one hand, the Commission regularly specifies the following condition in labor protective conditions:

> The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of railroads' employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

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[1] Including pre-hearing briefs, transcript, post-hearing briefs, countless references to court and arbitrators' decisions and many other exhibits.

Typically, the ICC specifies this condition in Article 1, Section 2 (Section 2) of its protective conditions, like the *Mendocino Coast* conditions applicable here.[2]

The clear implication of this condition is that the essence of an existing collective bargaining agreement (pay, rules, working conditions, pension rights, etc.), if not the agreement itself, continues after consolidation ("shall be preserved") unless changed by "future collective bargaining agreements". This latter phrase has two important implications: any new agreement must be different from the existing agreement and it has to be bargained for—which by definition means agreement or resort to authorized statutory actions to break the deadlock.

Thus, Section 2 applicable here in the Mendocino conditions provides substantial leverage for the Union arguing that certain changes desired by the Carriers under its ICC authorization (exemption) cannot be made unless both parties agree to the changes.[3]

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[2] Labor (or employee) protective conditions now authorized in the Interstate Commerce Act, resulting from railroad merger, consolidation, acquisition (including trackage rights), etc. ("consolidations"), date back, at least, to The Washington Job Protection Agreement of 1936. In the present dispute, the ICC adopted the "Mendocino" conditions (*Mendocino Coast Ry.—Lease and Operate—California Western R.R.*, 354 ICC 732 (1978), *modified*, 360 ICC 653, (1980), aff'd, *sub nom. Railway Executives' Ass'n. v. United States*, 675 F.2nd 1248 (D. C. Cir. 1982), and *Norfolk and Western Ry.—Trackage Rights—Burlington Northern, Inc.*, 354 ICC 605 (1978), *modified sub nom. Mendocino Coast Ry.—Lease and Operate—California Western R.R.*, 360 ICC 653 (1980), aff'd. *sub nom. Railway Labor Executives' Ass'n v. United States*, 675 F.2nd 1248 (D. C. Cir. (1982)). "New York Dock" conditions are also specified by the ICC for similar authorized changes. They are virtually the same as the Mendocino conditions. There have been—and there presently are—a number of differently named conditions all having the same purpose of specifying protection of railroad employees adversely affected by consolidations. The kind or adequacy of labor protective conditions in the present dispute are not in issue.

[3] The parties have agreed on all provisions except one. The 27 trainmen on the Interstate Railroad who are being consolidated into the N & W and Southern coal rail operations at coal sources in Southwest Virginia object to working under the N & W schedule of agreements (collective bargaining agreement or contract) and prefer to continue working under their own contract. In the alternative, the Interstate employees are willing to work

(footnote continues)

b. Section 4 Conditions

As the Union draws comfort in this dispute from Section 2, the Carriers emphasize that Article 1, Section 4 (Section 4), of the Mendocino conditions controls.

This section provides in pertinent part that where the Carriers contemplate an authorized transaction which

> will result in a dismissal or displacement of employees or rearrangement of forces

negotiations for the purpose of reaching an implementing agreement are required. If, at the end of a 20-day period the parties fail to agree, negotiations are to terminate and either party to the dispute may submit the dispute for adjustment, in accordance with designated procedures, including designation of a neutral referee whose decision "shall be final, binding, and conclusive".[4]

The clear implication of this Section 4 condition is that a "transaction", such as here contemplated, of at least rearranging forces,[5] was envisaged by the ICC when it granted the

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(footnote continued)

under the Southern contract. According to the Interstate employees, working under the N & W contract would—or probably would—require a change in home base with associated problems of moving families from Andover, Virginia to Norton, Virginia, about a 45-minute drive in these mountainous, narrow, coal traffic roads. That this is a relatively small railroad has no bearing on the intensity with which each party has argued its case. The issue being the same as in much larger consolidations, each side has brought out its heavy legal artillary to argue the case.

[4] The Carriers, here, invoked this authority by petition to the National Mediation Board. The Union opposed the petition. Such Board appointed this arbitrator to help resolve the dispute. At the arbitration hearing, the Union agreed with the Carriers to proceeds on the basis of a Tri-Partite Arbitration Panel but held to its position that this panel had no authority to decide the question of applicability of contract.

[5] The Carriers contemplate consolidating Interstate employees into the N & W Pocahontas Division. Although Interstate employees will have certain priority rights to work they performed before the consolidation and certain "equity" when the work is performed by N & W employees, seniority rosters will be integrated and assignments can vary off the property before the consolidation.

Carriers the authority (exemption) to consolidate and it anticipated inability of the parties to negotiate an agreement to implement such transaction or changes from past operations[6] by prescribing an arbitration procedure to resolve the dispute.

Under the logic of this condition, it is almost inconceivable the Commission would not have known that pay, *rules*, working conditions, etc., under an existing contract, would not be affected by the transaction. Thus, the Commission intended to give priority to its statutory base for authorizing the consolidation with protective conditions, namely, the Interstate Commerce Act, over anything in conflict under the Railway Labor Act.

c. Section 2 and Section 4 Impasse Not Resolved by ICC

Such long-time apparent, sharp inconsistency existing in its labor protective condition between Section 2 and Section 4, it would seem the Commission would have cleared up the matter one way or the other. It has not.

Whether the Commission is skittish about taking a firm position on a question which involves administration of a statute (RLA), over which it has no responsibility, may only be speculated. It may even be that the Commission has been inattentive to the discrepancy.[7]

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[6] Considering, among other things, that the purpose of the request to consolidate was to take advantage of the best grades of the respective railroads and to otherwise make the operation less costly and more efficient.

[7] A summary of the development of labor protective conditions by arbitrator Zumas—drawing on analyses by other arbitrators—is a basis for this speculation. In *The Matter of Arbitration Between Norfolk and Western Railway Company and Illinois Terminal Railroad Company v. Brotherhood of Locomotive Engineers and United Transportation Union*, decided February 1, 1982. Also, see, decision by arbitrator Seidenberg in *The Matter of Arbitration Between Baltimore and Ohio R.R. Company, Newburgh and South Shore R.W.Y. Coal and Brotherhood of Maintenance of Way Employees and United Steel Workers of America*, decided August 31, 1983.

In the Seidenberg award, the arbitrator reports that Section 2 of the New York Dock Conditions was newly added to the varied set of such conditions

(footnote continues)

The Commission may even have decided to defer to the courts the question of the applicability of the RLA, upon consolidation, in view of the substantial litigation and conflicting decisions on this and related points.

Whatever the reason the Commission has not reconciled Sections 2 and 4, the question has come around again in this proceeding: Does this arbitration panel have jurisdiction to consider the content of an implementing agreement where an existing contract would be changed and, if so, what shall be the contents of that implementing agreement?

3. Arguments

The Carriers are the moving party. They argue that:

(a) It would be inappropriate for the arbitration panel to decide the jurisdictional question because Section 4 provides required authority to fashion an implementing agreement without need to regard the "extrinsic" question on jurisdiction, leaving the disappointed party to take appropriate appeal to court.

(b) In the event the arbitration panel considers the jurisdiction question posed by the UTU, the Union's argument is defective because a tentative implementing agreement was reached by the parties on April 17, 1985, in bargaining under applicable Mendocino conditions, not under the RLA, which is not required. Also, the Carriers argue that a recent decision by the Court of Appeals for the District of Columbia Circuit, on which the Union heavily relies, actually supports the Carriers' position because, implicit in the remand of the case of the ICC to make certain findings of "necessity", was the conclusion that the Commission had the authority to decide as it had, but that

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(footnote continued)

developed by the Commission since the Washington Job Protection Agreement of 1936. The New York Dock Conditions were prescribed by the Secretary of Labor (not the ICC) for those agreements whereby carriers discontinue their inter-city rail passenger service which was assumed by AMTRAK. The dissimilarity is apparent between such change in railroad operations and the instant case involving like operations in the same area and affecting only 27 employees.

it had not satisfied certain preconditions. The Carriers urge reliance on an earlier decision in the Eighth Circuit Court of Appeals which is said to be more on point on the jurisdiction question.

(c) The Carriers were not precluded from going forward with preferred changes under Section 4 of Mendocino because of the Commission's finding on April 3, 1985 in the underlying case in this proceeding that "[n]o evidence has been presented to demonstrate that involved railroads intend to abrogate the contractual or statutory rights of employees". According to the Carriers, all this finding suggests is that allegations of a conflict between employees' RLA rights and a carriers' plans to effectuate an ICC authorized transaction are not to be resolved in an administrative proceeding in which the ICC passes upon the applicability or inapplicability of a blanket Section 10505 exemption.

The Union argues that:

(a) Section 2 of Mendocino precludes this arbitration panel deciding that Interstate railroad employees must operate under the N & W contract, relying in this conclusion on a series of supporting awards by arbitrators and that contrary awards by arbitrators have been eviscerated by the recent decision of the Court of Appeals for the District of Columbia Circuit.

(b) In any event, the ICC notice of April 3, 1985, concerning the absence of Carrier information on intention to abrogate contractual or statutory rights of employees shows that the Commission did not intend that there be an exemption from the requirements of the Railway Labor Act with respect to changes of pay, rules and working conditions.

4. Arbitration and Court Decisions

Arbitrators' decisions have not been dispositive of the Section 2, Section 4 impasse.[8]

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[8] The parties cited a number of arbitration awards on point. The majority of awards cited favor the Union's position—but not overwhelmingly. The arbitration decisions reported are typical of the findings.

Decisions by experienced and respectable arbitrators Zumas and Seidenberg, *supra,* do not settle the matter. Each arbitrator decided against jurisdiction based on Section 2 but proceeded to require changes such as merging seniority rosters as part of an implementing agreement. Seniority rights being arguably the most important contract right for an employee, it is difficult to see a basis for deciding a Section 4 question in view of the arbitrator's decision on Section 2.

A more recent decision by arbitrator (judge) Brown on which the Carriers rely also cannot be accepted as new reasoning on the Section 2, Section 4 controversy. That arbitrator accepted jurisdiction on the strength of Section 4, adopting the argument that the ICC had plenary and exclusive authority in the field. *In The Matter of Arbitration Between Union Pacific Railroad Company and United Transportation Union,* decided January 1985. The difficulty with that decision is that, subsequently, the Court of Appeals for the District of Columbia Circuit, with respect to the same underlying consolidation, decided, in a split panel, that the Commission had completely failed to justify the necessity for waiving the Railway Labor Act respecting crew selection, following certain trackage rights granted to other railroads affected by such consolidation, and the court remanded the dispute to the Commission to consider whether it was necessary to waive the RLA to effectuate the transactions at issue in that consolidation. *Brotherhood of Locomotive Engineers v. ICC,* 761 F.2d 714 (D.C. Cir. 1985), *modified*—F.2d—(July 12, 1985), referred to hereinafter as "BLE".[9]

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[9] The Carriers here urge adopting the decision of the Court of Appeals in the case of *Brotherhood of Locomotive Engineers v. Chicago and North Western Railway Company,* 314 F.2d 424 (8th Cir.) *Cert. denied* 375 US 819 (1963). In that case, the action was by the railroad against the union for a judgment declaring rights of the parties with respect to procedures to be followed in adjusting seniority rights of employees affected by consolidation of railroad yards. The Court of Appeals affirmed the District Court (202 F.Supp.277) that statutory authority conferred upon the Interstate Commerce Commission to approve and facilitate merger of carriers includes power to authorize changes in working conditions necessary to effectuate such mergers and the Commission acted within its jurisdiction in providing for adjustment

(footnote continues)

As modified, the Court vacated the Commission's 1983 orders and remanded the case to the Commission. Supporting such decision, the Court said:

> The Commission is not empowered to rely mechanically on its approval of the underlying transaction as justification for the denial of a statutory right. On remand, to exercise its exemption authority, the Commission must explain why termination of the asserted right to participate in crew selection is necessary to effectuate the pro-competitive purpose of the grant of trackage rights or some other purpose sufficiently related to the transaction. Until such a finding of necessity is made, the provisions of the Railway Labor Act and the Interstate Commerce Act remain in force.

5. Arbitration Panel Has Jurisdiction To Order Implementing Agreement

Whatever arguments remain on the merits of the split decision in the BLE case, it can no longer be argued sensibly that, simply because the ICC has authority to impose protective conditions in railroad consolidations, RLA rights may be disregarded. But that is not to argue that the BLE decision puts the RLA back in the stream of things in consolidations of the kind in issue. The majority of the BLE court—with a vary strong dissent—remanded the case *to the ICC* to make findings it had not previously made with respect to RLA rights. The majority decision, therefore—as well as the minority decision—may be taken for the conclusion that the ICC can take all necessary action to authorize a consolidation, including labor

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(footnote continued)

of labor disputes arising out of the approved merger. The Court of Appeals noted that, under the Railway Labor Act in a major dispute, employees cannot be compelled to accept or arbitrate as to new working rules or conditions, 45 U.S.C.A. § 151 *et seq.*, but that, as a result of the authorized merger in that case, the railroads and unions were relieved from requirements of the RLA by the Commission's authority under the Interstate Commerce Act concerning merger of carriers. Interstate Commerce Act § 5(2)(b), (c)(4).

protective conditions and procedures to resolve disputes on implementing agreements, including arbitration without deference to RLA collective bargaining rights. The only imperative is that the ICC make required findings, not that it is not authorized to make them.

As it can be accepted that the ICC has authority, i.e., jurisdiction, to effectively make a package deal on consolidations, labor protective conditions and procedures to resolve disputes on implementing agreements—based on both the Eighth Circuit and D. C. Circuit opinions—there is no logical reason not to accept that an arbitration panel, authorized under the ICC consolidation action, would not have jurisdiction to order changes to meet the purposes and objectives of the consolidation.

On such reasoning, this panel has jurisdiction to take Section 4 action in this case.

Such conclusion does not close the door in favor of the Carriers.

The Union argues, with some persuasion, that, by not presenting their RLA arguments to the Commission, the Carriers did not argue their case at the time and place to have accomplished their objectives.

It is most troublesome that, at the time the Railway Labor Executives' Association (RLEA), on behalf of employees in this dispute, argued RLA rights to the ICC, the Commission not only commented that "[n]o evidence has been presented to demonstrate that the involved railroads intend to abrogate the contractual or statutory rights of employee" (ICC Notice, Finance Docket No. 30582 (Sub No. 1), April 3, 1985), but added in the same notice that, although exemptions under 49 U.S.C. 10505, do not operate to relieve carriers of applicable laws and agreements relative to labor relations

> This proceeding is not the appropriate forum to resolve the issue of whether applicable laws and labor agreements require the railroads to obtain the consent of employees before making employment changes under either the exempted contract to operate or the trackage rights.

If the Commission meant that the appropriate forum was an arbitration panel, as here, the Commission was ducking its clear responsibility to complete the package to satisfy its statutory responsibilities.

If the Commission meant that the appropriate forum was the courts, it was ducking the same responsibilities.

If the Commission meant to leave the parties to their RLA rights, it was ducking the same responsibilities.

Actually, it seems that the Commission was just ducking.

There is no need or reason for this arbitration panel to duck.

The ICC had jurisdiction to complete the action; thus, the panel has jurisdiction to complete the action.

An implementing agreement will be ordered.

II. IMPLEMENTING AGREEMENT

No responsible court would ultimately refuse to order an implementing agreement under the disputes settling provisions of Section 4. Only the 27 trainmen off the Interstate Railroad who did not ratify the tentative agreement of April 17, 1985, are holding out on working under the N & W contract. All the other unions in this case have accepted the same or similar agreement, including organizations representing firemen, engineers, clerks and maintenance of way employees.

Labor protective conditions are in place.

There is no legal, public policy, or common sense reason not to decide at this level of proceedings what will eventually be decided, i.e., an implementing agreement to accomplish the purposes of an authorized consolidation.

The proposed joint operation of the Interstate Railroad properties, which are located in the coal fields of Southwestern Virginia, following a consolidation in 1982 of N & W, Southern and their respective subsidiaries, including Interstate, under the control of Norfolk Southern Corporation, is intended to take

advantage of better grades and operating routes for traffic moving from Interstate origins to points on the N & W and Southern and to achieve certain economies and efficiencies in interstate operations.

Among changes proposed by the Carriers to realize the advantages of such joint operation are consolidating the seniority rosters of Interstate train and engine service employees with those of N & W Pocahontas Division train and engine service employees. At present, Interstate crews do not work on N & W lines or vice versa. Upon consolidation, Interstate crews will operate off the Interstate territory. They would work shifters in the area that can work both Interstate and N & W mines.

According to T. E. Gurley, General Manager, Eastern Region, N & W Railroad, who testified at the arbitration hearing, in future operations, it is not contemplated that Interstate crews will be operated separately from the crews of the N & W. Rather, it is contemplated that the crews will be combined on shifters in the Norton and Andover, Virginia area, based on their seniority on both N & W and Interstate. If the Interstate trainmen did not operate under the N & W contract but, rather, operated under their present Interstate contract, important contract problems would develop, including observance of the Hours of Service law; different reporting locations for crews operating the same territory; differences of total hours worked each week (referred to as "gouging"); differences on opportunities to bid for and displace a junior employee on a job preferred by a senior employee; and different operation of extra boards. If, however, the N & W contract were applicable (for the 27 Interstate trainmen and the existing 816 N & W trainmen), employees, including present Interstate employees, would be able to draw assignments throughout the territory (which is considerably larger than the territory presently operated by Interstate contracts, such as deadheading, filling vacancies, meal times, selection of vacation times and arbitraries, which would creat friction as between N & W and Interstate crews working the same territory if the employees worked under different contracts, would be eliminated. Also, Interstate employees would enjoy the higher basic rate of pay presently applicable in the N & W contract.

According to A. Smith, General Chairman for the trainmen and conductors on both the Interstate and Southern railroads, the Union offered to work under the Southern agreement, which would accomplish exactly what the Carriers intend under the proposed implementing agreement, including the N & W contract. According to this official, there would not be, for instance, a provision for gouging or a provision that a senior brakeman could displace a junior brakeman. There would be a deadhead rule and extra boards would not be different. And there would be no difference in meal allowances or in bidding for vacant positions. Moreover, the Interstate employees would get a raise under either the Southern or N & W agreement.

Further, to the question asked by counsel for the Union: "With the Southern Agreement being applicable, could the employees of the Interstate be required to report to Norton?" The answer was "Yes, sir." (Transcript, page 100).

On close questioning why the trainmen on the Interstate resisted accepting the tentative implementing agreement reached by the parties on April 17, 1985, the Union representative testified that the Interstate employees had worked previously with the Southern agreement and were more comfortable with it, but that their major concern was the possibility of having to move from their home area in Andover, Virginia to another point on the consolidated operation, with all of the adverse implications for families involved in such move.

In negotiations leading to the tentative implementing agreement, upon the insistence of Union negotiators, a seniority provision was agreed to in order to keep a fair balance between bidding rights of the relatively small number of trainmen off the Interstate as compared to those rights of about 816 trainmen off the N & W.

If, as the Union now accepts, Interstate trainmen might be required to move their home base under the Southern contract (which is acceptable to the union), and there is no substantial reason not to accept the N & W contract on the other differences between the two contracts, there is no reasonable basis to reject the tentative implementing agreement of April 17, 1985. Recognizing, again, that labor protective conditions

are in place and that, on its face, provisions in the N & W contract may actually be favorable to the Interstate employees, the tentative implementing agreement of April 17, 1985 is fair, equitable and reasonable and will effectuate the purposes and objectives of the transaction exempted by the Interstate Commerce Commission when it authorized the consolidation underlying the proposed joint operation of Interstate properties.

AWARD

1. This arbitration panel has jurisdiction to consider an implementing agreement under Article I, Section 4 of the *Mendocino Coast* labor protective conditions.

2. The Carriers are authorized to put into effect the tentative implementing agreement of the parties, dated April 17, 1985.

ROBERT J. ABLES

Robert J. Ables
Neutral Referee

Dated: September 25, 1985

DAVID N. RAY

David N. Ray
Carrier Member

Dated: September 27, 1985

L. W. SWERT
Dissenting Opinion Attached

L. W. Swert
Employee Member

Dated: October 10, 1985

Dissent of Employee Member to Award in Finance Docket 30582 (Sub. No. 1)

I cannot agree with the Award in this matter not only because it is contrary to the great weight of arbitral precedent and legal authority in my view, but also because of its cavalier treatment of the facts.

It assumes the April 17, 1985 document was a "tentative implementing agreement" throughout its analysis when the

record shows the matter of contract applicability was never settled. The Union parties merely agreed to submit the document to the membership as the carriers' last offer. Although the Award notes in footnote at page 5 that the parties agreed to all provisions of an implementing agreement "except one" (contract applicability), it treats the April 17, 1985 document *in toto* as an agreement in the remainder of its analysis.

More importantly, the Award purports to resolve collective bargaining issues that the carrier witness frankly admitted were not raised between the parties concerning the differences in the contracts at issue. Nothing could more clearly indicate this Board's usurpation of authority delegated by the Congress to the parties under the Railway Labor Act.

Finally, the Award's language itself indicates the the Board has acted far beyond the scope of its jurisdiction. The Board notes at page 7 that the ICC has not resolved over the years what the Board perceives as the inconsistency between Article I, Section 2 and Article I Section 4. Moreover, it is beyond cavil that unless the ICC justifies in its order that the Railway Labor Act be negated in a specific transaction, the requirements of that act regarding changes in contracts stand. This was noted by the Board in its citation to *BLE* v. *ICC*, 761 F.2d 714 (D.C. Cir. 1985) at pages 12 and 13. The Board then blithely ignored the ICC's specific order concerning Railway Labor Act rights cited at page 15, and after finding the ICC "ducked" the issue, decided it nonetheless had authority to change the contract on the property. This Board has no more authority than the ICC; and where the ICC has "ducked" this issue specifically, this Board may not resurrect it without acting outside the scope of its jurisdiction. *BLE* v. *ICC, supra.*

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(10) (11)

Nos. 85-792 and 85-793

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, PETITIONER

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

In our opening brief, we urged that the Interstate Commerce Commission's approval of trackage rights granted to the Missouri-Kansas-Texas (MKT) and Denver & Rio Grande Western (DRGW) railroad companies, in connection with the Commission's approval of a major rail consolidation,[1] exempts those carriers from provisions of the Railway Labor Act (RLA), 45 U.S.C. 151 *et seq.*, that would pose obstacles to the implementation of the approved transactions. We demonstrated that the plain language of the Interstate Commerce Act's (ICA's) statutory exemption provision, 49 U.S.C. 11341(a), sup-

[1] See *Union Pacific Corp., Pacific Rail System, Inc. & Union Pacific R.R.—Control—Missouri Pacific Corp. & Missouri Pacific R.R.*, 366 I.C.C. 462 (1982).

ports the Commission's interpretation (Gov't Br. 23-28). We also demonstrated that the Commission's interpretation is consistent with the structure and purposes of the ICA's consolidation provisions (*id.* at 28-35) and with six decades of agency and court interpretation of the statute (*id.* at 36-42). We explained that the contrary view taken by the court of appeals reflects a serious misunderstanding of the role of the Commission in approving carrier-negotiated transactions (*id.* at 32-34) and would seriously impede the implementation of Commission-approved transactions (*id.* at 42-47). Respondent unions, Brotherhood of Locomotive Engineers (BLE) and United Transportation Union (UTU), have largely failed to answer our arguments. Instead, they devote much of their energy to issues raised in their pending cross-petitions, obscuring the central issue in this case.

1. The issue in this case is the meaning of Section 11341(a), which exempts a party to a Commission-approved transaction from "all other law * * * as necessary to let that person carry out the transaction." We submit that once the Commission (and the reviewing courts) approve a transaction as consistent with the ICA's congressionally specified public interest standards,[2] Section 11341(a), by its own force, exempts the party implementing the transaction from other laws that conflict with the terms of the transaction. The unions, on the other hand, maintain that the Commission, rather than Section 11341(a), provides the exemption (UTU Br. 16) and that the Commission, even after it has approved a transaction as consistent with the public interest, must "examine the means proposed by the carrier to ascertain whether that is the only method by which the transaction can be accomplished" (*id.* at 26).

[2] Section 11344(b)(1) of the ICA requires that the Commission consider various "public interest" factors, including the transaction's effect on competition and the interests of carrier employees (49 U.S.C. 11344(b)(1)).

a. The unions offer little response to the Commission's submission that the plain language of Section 11341(a) demonstrates that the provision is self-executing (Gov't Br. 23-28). They cite plain language principles (UTU Br. 18-19; BLE Br. 23) but fail to point to any language in Section 11341(a) that requires the Commission to conduct the necessity analysis that they envision. BLE opaquely observes that "[t]he exemption contained in section 11341 is not as broad as asserted by the [Commission] but only extends by its terms to those exclusions 'necessary to let that person carry out the [approved or exempted] transaction' " (Br. 37, quoting 49 U.S.C. 11341(a)). UTU states that the Commission's interpretation "effectively writes the necessity component out of the law" (Br. 20). The Commission's interpretation, however, is faithful to, and indeed mandated by, the statutory language.

Section 11341(a) does *not* state—as the unions would have it—that the Commission may exempt participants from other laws to the extent that the Commission determines that the particular transaction terms are "necessary" to the overall success of the transaction. Instead, the statute provides, in self-executing form, that a participant in an approved transaction "*is exempt*" from "other law * * * as necessary to let that person carry out the transaction" (49 U.S.C. 11341(a) (emphasis added)). The question is not whether particular transaction terms are, in the Commission's articulated judgment, "necessary." The question is whether, given the transaction negotiated by the parties and approved by the Commission, an *exemption* from other laws is "necessary" to allow the transaction to be implemented in accordance with its terms. If so, then *the statute* confers the necessary exemption. The Commission's adherence to Section 11341(a)'s unambiguous language does not "write[] the necessity component out of the law." Instead, it recognizes that Section 11341(a) defines the scope of the exemption by the terms of the approved transaction.

b. The unions offer no response to our submission (Gov't Br. 20, 28-35) that the Commission's interpretation is consistent with two central purposes of the ICA's consolidation provisions: first, to leave to the carriers themselves the task of formulating transactions; and second, to expedite transactions that are in the public interest by replacing the complex web of potentially applicable federal, state, and local law with a single Commission proceeding, involving all interested parties, where the proposal can be evaluated in its entirety under congressionally specified criteria. The unions, limiting their focus to the question of labor relations, seemingly overlook the fact that Congress has instructed the Commission to implement a national transportation policy that, in turn, requires consideration of competition and economic efficiency issues as well as labor protection. See 49 U.S.C. 10101a(2).

c. The unions' principal argument on this point is that the Commission's interpretation of Section 11341(a) is inconsistent with a Fifth Circuit decision, *City of Palestine* v. *United States*, 559 F.2d 408 (1977), cert. denied, 435 U.S. 950 (1978). See UTU Br. 26-29; BLE Br. 38-39. However, that case has little relevance here. As we explained in our opening brief (at 41 n.26), *City of Palestine* held that the Commission exceeded the scope of its transaction approval authority when it purported to void a contract that was "not germane" to the merger transaction (559 F.2d at 414).[3] But the court expressly recog-

[3] In that case, the Commission granted a merging railroad's request that it be relieved of a burdensome agreement with the City of Palestine, requiring that a certain percentage of the railroad's operations take place in that city. The court reversed the Commission, explaining (559 F.2d at 414):

> The Palestine Agreement has no role in the [Commission's] analysis of the proposed voluntary merger * * *. Despite the irrelevance of the Palestine Agreement to the merger, the [Com-

nized that it was dealing with the scope of the Commission's transaction approval authority, not with the meaning of Section 11341(a) as applied to terms that are plainly part of what the Commission is authorized to approve. See 559 F.2d at 414. Two other factors further distinguish the present case from *City of Palestine*. First, the unions here failed to raise any "germaneness" objection to the challenged transaction terms during the Commission's approval proceedings.[4] Second, there is no serious dispute

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> mission] has gratuitously relieved [the railroad] of its contractual obligations. We cannot countenance that action.

Thus, that case turned on the fact that the contractual obligation was irrelevant to the transaction at issue.

We note that the Commission here, through its labor protective provisions, has required each railroad to protect the collectively bargained rights of its employees who are affected by the transaction. Contrary to UTU's suggestion (UTU Br. 10), the Missouri Pacific Railroad Company (MP) has never denied its obligation to negotiate an implementing agreement with its employees governing any required rearrangement of MP forces resulting from MKT's and DRGW's trackage rights operations. And, as UTU acknowledges (*id.* at 11 n.9), MKT has negotiated new collective bargaining agreements with its employees governing its trackage rights operations. See MKT Br. 7-9.

[4] Interested parties are generally expected to challenge the germaneness of transaction terms during the Commission's transaction approval process. That is exactly what the City of Palestine did (see 559 F.2d at 412) and what the unions failed to do here. The unions participated in the Commission's consolidation proceedings, were fully aware that MKT and DRGW had requested trackage rights reserving the rights to use their own crews, but failed to object to the railroads' crewing terms (Gov't Br. 7-9, 43-45; MKT Br. 3-7). The unions never suggested that Commission approval of MKT's and DRGW's proposals would conflict with employee rights under the RLA or under existing collective bargaining agreements (see Pet. App. 58a-62a).

The unions contend that their failure to raise timely objections is excusable because they thought that the Commission's labor protective provisions would negate crewing terms of the proposed trackage rights agreements (UTU Br. 21-22; BLE Br. 27 n.13). That contention

that the crewing provisions at issue *are* germane terms of the trackage rights transactions.[5]

City of Palestine simply does not reach the central issue here: whether Section 11341(a) is self-executing. Contrary to the unions' contentions, the Commission's interpretation of Section 11341(a) is fully consistent with judicial and agency precedent. As we noted in our opening brief (at 36-39), the Eighth Circuit has expressly recognized that Section 11341(a) is self-executing. *Brotherhood of Locomotive Engineers* v. *Chicago & N.W. Ry.*, 314 F.2d 424, 432, cert. denied, 375 U.S. 819 (1963). The First Circuit recently acknowledged the "self-executing nature of § 11341(a)" as well. *Brotherhood of Locomotive Engineers* v. *Boston & Maine Corp.*, 788 F.2d 794, 801 (1986), cert. denied, No. 85-2153 (Oct. 6, 1986). And the Commission has consistently adhered to that position for nearly 30 years. See Pet. App. 67a; *Railway Express*

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strains credulity. The Commission has *never* interpreted its labor protective provisions as negating the right of a railroad, granted trackage rights in a consolidation, to crew its own trains. The railroads' specific reservation of crewing rights in their proposed trackage rights agreements certainly should have put the unions on notice of the need to challenge that provision or run the risk that their objections would be time-barred. See, *e.g.*, *Eagle-Picher Industries* v. *EPA*, 759 F.2d 905, 914 (D.C. Cir. 1985).

[5] The Commission required MP to give MKT and DRGW trackage rights over MP lines for the specific purpose of ensuring that those railroads could remain in competition with MP. If, as the unions now urge, the MP employees were to control the crewing decisions of the tenant railroads, the effectiveness of those trackage rights could be jeopardized. As Judge MacKinnon explained, "the Commission's goal of preservation of competition through the grant of trackage rights might well be frustrated by the prospect of requiring the railroads granted those rights to negotiate with the union representing the employees of [their] *competitors*" (Pet. App. 39a (emphasis in original)). The majority did not conclude otherwise. See Pet. App. 45a.

Agency, Inc., Notes, 348 I.C.C. 157, 215 (1975); *Revised Regulations Governing Interlocking Officers*, 336 I.C.C. 679, 681 (1970); *Texas Turnpike Authority Abandonment By St. Louis S.W. Ry.*, 328 I.C.C. 42, 46 (1965); *Chicago, St. P., M. & O. Ry. Lease*, 295 I.C.C. 696, 702 (1958). The Commission's longstanding and judicially affirmed interpretation should be respected. See, *e.g.*, *Hayfield Northern R.R.* v. *Chicago & N.W. Transp. Co.*, 467 U.S. 622, 634 (1984).

d. The unions fail to address the practical consequences of their interpretation of Section 11341(a). As we explained in our opening brief (at 32-34, 42-46), the unions would require that the Commission determine which of the terms of a privately negotiated transaction are "necessary" terms and then require that the Commission, rather than the interested parties, anticipate and identify potential legal obstacles to carrying out those terms. The unions would then permit interested parties to thwart Commission-approved transactions by raising post-approval legal challenges to transactions that have been reviewed and found consistent with the public interest. In the present case, the unions' protracted litigation has imposed considerable burdens on the implementation of a trackage rights transaction that the Commission not only approved but required as a condition to a major rail consolidation. The record in this case demonstrates how the unions' position would impede effectuation of the Nation's rail transportation policy.

2. The unions devote much of their argument to the broad questions presented in their pending cross-petitions (85-983 Pet.; 85-997 Pet.) rather than to the specific and quite different question presented by the petitions for certiorari. They maintain, in essence, that they have a contractual agreement with the Missouri Pacific Railroad Company (MP) entitling them to bargain over crewing of

MKT and DRGW trains and that the Commission lacked power to take away their rights under the agreement with MP (BLE Br. 28-34, 43-47; UTU Br. 31-50). Those contentions are not responsive to the question presented in the petitions and are, in any event, mistaken.

a. The unions asserted in the proceedings below that they have an established right, as representatives of MP employees, to negotiate with MKT and DRGW concerning the crewing of the MKT and DRGW trackage rights operations, and that those operations could not be commenced until a new collective bargaining agreement had been negotiated in accordance with the RLA. They specifically contended that (1) the issue of what crews would operate MKT and DRGW trains operating over MP tracks must be settled through the RLA's major dispute provisions; and (2) the ICA's labor protective provisions, 49 U.S.C. (Supp. II) 11347, and the labor protective conditions imposed by the Commission thereunder prohibited MKT and DRGW from unilaterally deciding to use their own crews.

The Commission rejected those contentions (Pet. App. 58a-60a, 65a). The court of appeals, however, did not address them; instead, it instructed the Commission to "explain why termination of the asserted right to participate in crew selection is necessary to effectuate the pro-competitive purpose of the grant of trackage rights or some other purpose sufficiently related to the transaction" (Pet. App. 45a). The court, by characterizing the unions' purported right to "cross-bargain" with a competing railroad as an "asserted right" (*ibid.*), plainly declined to determine whether the right even exists. And the court, by requiring a remand to the Commission, intimated—but did not expressly decide—that the Commission does have power to approve transactions that specify crewing arrangements. In sum, the only question squarely decided by the court of appeals is the question presented in the peti-

tions for certiorari, *i.e.*, whether the Commission's action was sufficient to exempt the crewing terms from any collective bargaining process required by the RLA, not the question presented in the unions' cross petitions, whether the unions had an established right to cross bargain that could not be eliminated by *any* Commission action. If the Court wishes, however, to address the unions' arguments, we would take issue with their position.

b. First, on the record in this case, the unions' purported cross-carrier bargaining rights simply do not exist. The Commission found the unions' claim to those rights "unpersuasive and unsupported by the record" (Pet. App. 58a-59a, 65a). And Judge MacKinnon rejected the unions' cross-bargaining contentions, stating "[t]here is no basis in law or fact for such an absurd conclusion" (*id.* at 29a). The unions, even in this Court, have failed to identify the source of these asserted rights, arguing instead that the Commission "must assume that rail labor had such a right" (UTU Br. 25 n.13).[6]

But even if the unions had such cross-carrier bargaining rights, the unions are mistaken in contending that the Commission has no authority to approve a transaction term that affects such rights. As MKT persuasively explains (Br. 19-35), Congress has recognized that rail consolidation will necessarily affect rail employees' collectively bargained rights. The ICA accordingly instructs the

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[6] The unions have never identified any provision of a collective bargaining agreement that provides them with cross-carrier bargaining rights. And UTU, acknowledging the D.C. Circuit's decision in *Central Vermont Ry.* v. *Brotherhood of Maintenance of Way Employees*, 793 F.2d 1298 (1986), now concedes that such cross-carrier bargaining rights do not exist under the RLA (UTU Br. 43 n.23). UTU instead insists (without any citation of authority) that such rights somehow spontaneously spring into existence through the Commission's labor protective conditions (*ibid.*).

Commission to consider "the interest of carrier employees affected by the proposed transaction" (49 U.S.C. 11344(b)(1)(D)) and mandates labor protective provisions to provide compensation for displaced workers (49 U.S.C. (Supp. II) 11347). These provisions exist precisely because adjustments of working conditions inevitably accompany rail consolidations and related transactions. The courts have repeatedly recognized the Commission's power to prescribe methods for resolving labor issues that might otherwise frustrate transactions that serve the public interest. See, *e.g.*, *Brotherhood of Locomotive Engineers* v. *Boston & Maine Corp.*, 788 F.2d at 800; *Burlington Northern, Inc.* v. *American Railway Supervisors Ass'n*, 503 F.2d 58, 62-63 (7th Cir. 1974); *Nemitz* v. *Norfolk & W. Ry.*, 436 F.2d 841, 845 (6th Cir.), aff'd on other grounds, 404 U.S. 37 (1971); *Brotherhood of Locomotive Engineers* v. *Chicago & N.W. Ry.*, 314 F.2d at 430-431.

The unions' claims are particularly far-fetched under the facts of this case. The unions essentially contend that a private agreement between *MP and its employees,* which supposedly creates "cross-carrier" bargaining rights, disables the Commission from imposing, on a merger initiated by MP, conditions designed to protect the public interest in competition.[7]

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[7] The unions mistakenly contend that the Commission's authority is limited to supplementing rail labor's rights (UTU Br. 37-38), stating that "[e]mployee interests were considered and protected, not because employee protection was the price to be paid to allow a rail carrier to change rates of pay, rules or working conditions, but rather, because Congress had determined that it was not in the public's interest for rail employees to provide the economic benefits which consolidations could achieve for railroads" (*id.* at 38). That reasoning directly conflicts with this Court's observation that the purpose of the ICA's labor

The unions are also mistaken in contending that the ICA's own labor protective provisions, 49 U.S.C. (Supp. II) 11347, prohibit the Commission from adjusting collective bargaining rights. As the Commission explained (Pet. App. 59a-60a), Section 11347 and the Commission's labor protective provisions preserve existing collective bargaining rights only to the extent that they do not conflict with implementation of an approved transaction. The amicus curiae brief of the Association of American Railroads and National Railway Labor Conference discusses this matter

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protective provisions is "to provide compensatory conditions" for rail employees adversely affected by rail consolidations. *Norfolk & W. R.R.* v. *Nemitz*, 404 U.S. 37, 42 (1971).

The unions also place mistaken reliance (UTU Br. 40-41) on a prior Commission decision, *Southern Ry.—Control—Central of Georgia Ry.*, 331 I.C.C. 151 (1967). In *Southern*, the Commission determined that a rail carrier, consolidating operations through a Commission approved transaction, remained subject to the requirements of the Washington Job Protection Agreement (see Gov't Br. 5 n.3) and various collective bargaining agreements. However, the Commission noted that it had previously imposed those requirements as conditions of the transaction. (331 I.C.C. at 168 ("[W]e made it clear that the obligations of the collective bargaining agreements which, parenthetically, includes the Washington Agreement, should be observed in carrying out the consolidations proposed.")). There is nothing unusual in this practice. See *Norfolk & W. R.R.*, 404 U.S. at 43. Furthermore, the *Southern* decision specifically observed that the Commission's labor protective conditions supplant the RLA dispute resolution procedures (331 I.C.C. at 171). The *Southern* decision does contain dictum concerning the "independent nature of those rights" given by the Washington Agreement (*id.* at 169). However, the Commission has determined that this dictum "was not reflected in the future course of labor history and will not be followed today." See *Maine Central R.R., Georgia Pacific Corp., Canadian Pacific, Ltd. & Springfield Terminal Ry.—Exemption From 49 U.S.C. 11342 & 11343*, Finance Docket No. 30532 (I.C.C. Aug. 22, 1985) (*reprinted in* 85-792 Pet. Addendum B at 48a n.9), appeal pending, No. 85-1636 (D.C. Cir.).

at some length (Br. 24-30). We simply add that the Commission's position is entitled to considerable deference since it represents the Commission's construction of its own regulations under a statute it is charged with enforcing. See *Andrew G. Nelson, Inc.* v. *United States*, 355 U.S. 554, 558 (1958); see also *Hayfield Northern R.R.* v. *Chicago & N.W. Transp. Co.*, 467 U.S. at 634.

For the foregoing reasons, as well as the reasons set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Petitioner,

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BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND UNITED TRANSPORTATION UNION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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I. The Interstate Commerce Commission Is Not Required To Make Specific Findings Under Section 11341(a) In Order To Exempt Carriers From Laws That Frustrate Implementation Of Transactions Approved Under Sections 11343 and 11344.

A. Respondents' assertion that section 11341(a) is not self-executing is contrary to the statutory language, legislative history, the Court's previous decisions, and public policy.

Respondents Brotherhood of Locomotive Engineers ("BLE") and United Transportation Union ("UTU") assert that, to give effect to the "as necessary" language of the Interstate Commerce Act's ("ICA") statutory exemption provision, 49 U.S.C. § 11341(a) (1982), the Interstate Commerce Commission ("ICC" or "Commission") is required to make specific findings exempting a carrier from obligations of laws that pose an obstacle to the implementation of a financial transaction approved under 49 U.S.C. §§ 11343 and 11344 (1982). They argue that the ICC not only must determine that the transaction is in the "public interest" under section 11344, but also must make a separate "necessity finding" under section 11341(a) that (1) the policies of the conflicting statute have been expressly considered; (2) the conflicting statute would absolutely prohibit the implementation of the approved financial transaction; and (3) the proposed terms of the approved transaction are "the *only* method by which the transaction can be accomplished." UTU Br. at 24-28 (emphasis added).[1] None of these arguments has any merit.

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[1] Citations in the form "UTU Br. at ____" refer to respondent UTU's brief, filed August 15, 1986. Respondent BLE's brief, filed August 7, 1986, is referred to herein as "BLE Br." Petitioner MKT's petition for writ of certiorari, filed November 7, 1985, is referred to herein as "MKT Pet."; its opening brief on the merits, filed June 7, 1986, is referred to herein as "MKT Op. Br."

1. Respondents' affirmative assertions are unsubstantiated.

As we demonstrated in our opening brief (at 35-38), this Court has long since determined that a separate necessity finding is not required by section 11341(a). *Schwabacher v. United States*, 334 U.S. 182, 194-95 (1948); *see also McLean Trucking Co. v. United States*, 321 U.S. 67 (1944). In *Schwabacher*, the Court stated that once the ICC makes its determination that a voluntary railroad merger is "consistent with the public interest" within the meaning of section 5(2)(b) of the ICA (the predecessor of section 11344), the exemption provisions of section 5(11) (the predecessor of section 11341(a)) automatically apply to enable the carriers to effect the transaction.

BLE's brief is virtually silent on *Schwabacher*; UTU's attempt to distinguish it is unconvincing. UTU contends that *Schwabacher* involved a conflict between the ICA and a state law, two matters that were "committed to the complete control of the Commission," UTU Br. at 25, but that the ICC may not resolve conflicts between the ICA and the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151-160 (1982), because the ICC does not have jurisdiction over labor matters. UTU Br. at 25-26. However, UTU ignores that for decades the ICC and the courts have recognized that the Commission does indeed have "jurisdiction" to resolve labor matters in the context of the implementation of transactions approved under the ICA. *See infra* pp. 12-20.

Respondents also maintain that the allegedly required necessity determination must include certain elements. First, it must be accompanied by evidence that the ICC "considered the policies expressed in [conflicting] laws in determining whether the relevant transaction is within the public's interest." UTU Br. at 24 (citing *United States v. ICC*, 396 U.S. 491 (1970), and *Southern Pacific Transportation Co. v. ICC*, 736 F.2d 708 (D.C. Cir. 1984), *cert.*

denied, 105 S. Ct. 1171, 1172 (1985)). As we noted in our opening brief, we agree that, once a party has raised the question of whether a conflicting law precludes approval of a proposed transaction, the ICC must undertake such a task. MKT Op. Br. at 37-38. But we also noted that such analysis was accomplished in the public interest proceeding held pursuant to section 11344. In accordance with the statutory requirements to consider "the interest of carrier employees affected by the proposed transaction," 49 U.S.C. § 11344(b)(1)(D), and to impose labor protective conditions, 49 U.S.C. § 11347 (1982 & Supp. III 1985), the ICC discussed at length the effect the proposed consolidation and trackage rights transactions would have on labor. Indeed, it was called upon by the unions to impose a greater level of labor protection than the standard section 11347 labor protective conditions. *Union Pacific Corp., Pacific Rail System, Inc. and Union Pacific R.R.—Control—Missouri Pacific Corp. and Missouri Pacific R.R.*, 366 I.C.C. 459, 618-22 (1982), *aff'd sub nom. Southern Pacific Transportation Co. v. ICC*, 736 F.2d 708 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1171, 1172 (1985). It declined to do so, 366 I.C.C. at 620-22, and was upheld on appeal, 736 F.2d at 725. At no point in the original proceeding or in their original appeal of the consolidation order did the UTU or BLE allege that allowing MKT to use its own crews violated the policies of RLA (or any other statute).[2]

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[2] When the respondents did raise this issue for the first time months later in their petitions for reconsideration of the ICC's order denying BLE's petition for clarification, the ICC squarely addressed the issue. It noted that in its section 11344 proceeding it "gave full consideration to the impact of the consolidation on railroad employees in accordance with our established policies. 366 I.C.C. 618-22." Decision of the Interstate Commerce Commission, October 25, 1983, MKT Pet. A44-45.

The ICC also stated:

> The record in these proceedings is devoid of any suggestion by BLE, UTU, or any other party that the approval of the responsive trackage rights applications, subject to the usual labor protective

Another linchpin in respondents' argument is that section 11341(a)'s override of conflicting statutes "applies 'only if those . . . laws pose an *obstacle* to the transaction.' " UTU Br. at 27 (quoting from the majority's opinion below) (emphasis added). Both the majority and respondents define "obstacle" as something that would absolutely prohibit the transaction. In its opening brief, MKT pointed out that none of the three Supreme Court cases relied upon by the majority below supported that proposition: *Texas v. United States*, 292 U.S. 522 (1934); *Callaway v. Benton*, 336 U.S. 132 (1949); and *Seaboard Air Line R.R. v. Daniel*, 333 U.S. 118 (1948). MKT Op. Br. at 34-35. Neither respondent challenges MKT on this crucial issue. UTU's discussion, especially its use of *Texas v. United States* (which it concedes allowed the ICC to immunize a carrier from the provisions of a state statute found to impose "unnecessary" and "burdensome" expenditures upon the carrier), UTU Br. at 27-28, demonstrates a law need not be a complete "obstacle" to the implementation of an approved transaction before immunity attaches.

UTU finally asserts that section 11341(a)'s override will not operate unless and until "the Commission [examines] the means proposed by the carrier to ascertain whether that is the *only* method by which the transaction can be accomplished." UTU Br. at 26 (citing *City of Palestine v. United States*, 559 F.2d 408 (5th Cir. 1977), *cert. denied*, 435 U.S. 950 (1978)) (emphasis added). This assertion is belied by the statutory language and legislative history of sections 11341(a) and 11344.

Section 11344 specifically states that the ICC "may impose conditions governing the [approved] transaction." Sec-

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conditions, would be in any way inconsistent with the policies of the RLA. In these circumstances, we can find no merit in UTU's argument that we improperly failed to reconcile the policies of the RLA with our decision.

Id. at A45.

tion 5(2)(a) of the Transportation Act of 1940 (the predecessor to section 11343) gave the ICC "explicit powers over trackage rights," including "the power to determine the terms and conditions under which trackage rights may be acquired." *Thompson v. Texas Mexican Ry.*, 328 U.S. 134, 146-47 (1946). Accordingly, the ICC has power not only to approve the proposed transaction, but also to impose conditions upon the transaction. Section 11341(a) then exempts "*anything authorized*"[3] by the ICC from conflicting laws that frustrate its implementation.

Here, pursuant to sections 11343 and 11344, the ICC unequivocally authorized MKT to operate its trains, using its own crews, over the Missouri Pacific lines. Pursuant to section 11341(a), that operation, including the crew selection provision, is exempt from all conflicting laws that frustrate its implementation. Nothing in the statute requires an additional determination that the operation of MKT trains by its own employees is the "only means" to effectuate the trackage rights operation.

Nor does *City of Palestine* support UTU's contention. The Fifth Circuit held that the section 11341(a) override of conflicting statutes is limited in that the ICC could not immunize terms of the transaction that were "irrelevant to the success of approved transactions." 559 F.2d at 415.

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[3] This language appeared in section 407, paragraph (8) of the Transportation Act of 1920, ch. 91, 41 Stat. 456, 482 (1920), which relieved carriers from the operation of all laws "in so far as may be necessary to enable them to do *anything authorized* or required by any order made under and pursuant to the foregoing provisions of this section." (Emphasis added.) In 1940, the language was changed slightly to read that carriers were relieved from all legal restraints "insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for *in accordance with the terms and conditions, if any, imposed by the Commission*[.]" Transportation Act of 1940, ch. 722, § 5(11), 54 Stat. 898, 908 (1940) (emphasis added). UTU concedes the language in section 11341(a) has the same meaning as in *all* versions since 1920. UTU Br. at 19.

UTU fails to explain how a court's refusal to immunize an approved term of a transaction because it was "irrelevant to the success of the transaction" equates to a requirement that the ICC remove a proposed term because it is not the *only means* through which the transaction may be implemented.

UTU undercuts its own contrary contention by admitting that "where the order of the agency clearly specifies what is to be performed, the application of Section 11341(a) should be obvious." UTU Br. at 21 (relying on *Central New England Ry. v. Boston & Albany R.R.*, 279 U.S. 415 (1929)). This is, we submit, *precisely* our case.[4] The ICC's order could not have been clearer: in order to ameliorate the anticompetitive effects of the principal consolidation transaction, the ICC conditioned the transaction by approving "[i]n Finance Docket No. 30,000 (Sub-Nos. . . . 25 . . .), the applications to acquire trackage rights, *to the extent and under terms and conditions discussed in the decision*[.]" 366 I.C.C. at 654, ordering paragraph 14 (emphasis added).[5]

MKT's application for the trackage rights expressly provided that MKT would operate its trains along the joint track "with its own employees, and at its sole cost and expense[.]" MKT Trackage Rights Application, Exhibit 2, Section 5, I.C.C. F.D. No. 30,000 (Sub-No. 25) (filed Jan.

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[4] The ICC here made clear what MKT was authorized to do. Exactly the opposite was true in *Central New England*. The ICC was not a party to that case nor was its explanation of what it had in fact authorized and exempted from all other laws sought or available. Instead, the exemption issue was raised as an affirmative defense in a contract action between two private litigants. 279 U.S. at 416-20.

[5] If there were any doubt as to the clarity of the consolidation order, the orders denying respondent BLE's petition for clarification (served May 18, 1983) and respondents' petitions for reconsideration (served October 25, 1983) were indisputably clear: the ICC determined the approved trackage rights transaction, with its crew selection provision, was "consistent with the public interest."

13, 1981). The ICC specifically discussed MKT's proposal to use its own crews; none of the modifications to the application discussed in the decision cuts back upon that crucial proposal. 366 I.C.C. at 566-72. Surely, the ICC was not obligated to reprint the MKT application in the ordering paragraphs of its decision; it was entitled to incorporate the application, and its modifications, by reference without sacrificing specificity as to exactly what it was approving. Its actions made the application of section 11341 "obvious."

2. Respondents' challenges to MKT's interpretation are unsubstantiated.

Respondent UTU challenges petitioners' interpretation that section 11341(a) is self-executing by inventing a strawman: that our view would render the ICC supinely captive to whatever schemes the carriers may propose and hence whatever blatant statutory overrides they may conceive. UTU Br. at 20. But we have never suggested that the ICC has only two options when presented with an application: deny it or approve it as presented. The ICC has broad authority to impose conditions upon proposed transactions to make them consistent with the public interest. *See* 49 U.S.C. § 11344(c).[6] Moreover, the notion that the ICC is stuck with whatever the carriers propose is belied by the existence of this dispute. The ICC conditioned its approval of the consolidation upon the granting of trackage rights to MKT.

UTU additionally contends that, because the unions are powerless to control whether the carriers exercise the permissive authority conferred by the ICC, "[i]t is contrary to elementary principles of statutory construction to assert that this form of statutory scheme also gives [the ICC]

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[6] Although the ICC lacks the power of legal compulsion, its power to condition has practical compulsory force because it leaves the proponents of a transaction with the choice of either accepting the conditions or abandoning a desired transaction.

power to control and direct [the union's behavior.]" UTU Br. at 17. In response, we note that the courts have consistently held that the "statutory scheme" was expressly designed to preclude the unions from controlling whether approved transactions were consummated; Congress did not intend to give unions a veto power over the implementation of approved transactions. *Missouri Pacific R.R. v. United Transportation Union*, 782 F.2d 107, 111-12 (8th Cir. 1986), *petition for cert. filed*, 54 U.S.L.W. 3463 (U.S. Dec. 19, 1985) (No. 85-1054); *American Airlines, Inc. v. CAB*, 445 F.2d 891, 896 (2d Cir. 1971), *cert. denied*, 404 U.S. 1015 (1972); *Nemitz v. Norfolk & Western Ry.*, 436 F.2d 841, 845 (6th Cir.), *aff'd on other grounds*, 404 U.S. 37 (1971); *Brotherhood of Locomotive Engineers v. Chicago & N.W. Ry.*, 314 F.2d 424, 431 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963).

Moreover, respondents were hardly strangers to this proceeding. Both the UTU and BLE took active roles in the approval proceeding, opposing the principal consolidation transaction, opposing the trackage rights application, and seeking enhanced labor protective conditions. They had adequate opportunity to object to the crew assignment provisions of MKT's application for trackage rights and to argue that those provisions undermined the policies of the RLA. Nowhere in that flurry of active participation did the unions raise such issues.[7] In the end, the ICC did exactly what the UTU now asks it to do: "impos[e] a fair and equitable arrangement to protect the interests of employees who may be affected [by the proposed trackage rights]." Comments of Brotherhood of Maintenance of Way Employees, Finance Docket No. 30,000 (Sub-Nos. 20-

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[7] The ICC should be held accountable to rule only on issues and objections presented by the interested parties in the section 11344 public interest proceeding. Because the unions did not challenge the crew selection provision of the MKT trackage rights application, the ICC should not be expected to rule on such issues *sua sponte*.

33) 2-3 (quoted in UTU Br. at 9). The ICC conditioned the grant of trackage rights by imposing the standard section 11347 labor protective conditions. 366 I.C.C. at 654, ordering paragraph 19.

Finally, respondent UTU repeatedly refers to the ICC decision as displacing existing contractual obligations. UTU Br. at 8, 10, 12-14. But in its brief, and indeed in its presentation to the ICC, the UTU is entirely silent as to what those contractual obligations may be. In its order denying reconsideration of the petition for clarification, the ICC correctly found that the unions pointed to *no* specific contractual right that was allegedly infringed, and, for that matter, failed to demonstrate any alleged violation of the RLA. Decision of Interstate Commerce Commission, October 25, 1983, MKT Pet. A45-48.

B. Assuming *arguendo* that specific findings under section 11341(a) are required, the ICC made such findings in the instant case.

Respondents allege that the ICC order was deficient in that it offered no "shred of reasoning" to support its view that MKT's use of its own crews was (1) a "material term" of the transaction and (2) necessary to the implementation of the transaction. UTU Br. at 29-30; BLE Br. at 35. No specific "reasoned basis" for that determination is required, for as Judge MacKinnon noted:

> [T]he necessity for the waiver is clear . . . . [T]he Commission's goal of preservation of competition through the grant of trackage rights might well be frustrated by the prospect of requiring the railroads granted those rights to negotiate with the union representing the employees of its *competitors*. It is no surprise the Commission did not feel compelled to spell out specifically such a proposition.

MKT Pet. A32 (emphasis in original).

Moreover, a subsequent event—the threatened strike against Missouri Pacific by the UTU—vindicated the conclusion that RLA procedures would interfere with the implementation of the transaction. Had the strike not been enjoined by court order, it would have shut down the MKT trackage rights operation. That, in turn, would have frustrated the implementation of the principal consolidation transaction, because, as the ICC determined, the consolidation was inconsistent with the public interest absent the trackage rights operation.

The ICC adequately and specifically explained the necessity of conditioning its approval of the consolidation transaction upon the grant of MKT's trackage rights request. 366 I.C.C. at 566-72. It did not approve MKT's request in the abstract. As Judge MacKinnon stated: "The whole basis for granting the trackage rights, which included the crew selection provisions, was the implicit conclusion that the granting of such rights was *necessary* to the approval of the merger." MKT Pet. A24 (emphasis in original).[8] Thus, respondents are incorrect when they argue that additional findings by the ICC are required to justify an exemption from the RLA in this case.

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[8] Section 11341(a) should require the ICC to determine only that the trackage rights transaction was "necessary" to the approval of the principal consolidation transaction. To require the ICC additionally to determine that the train crew selection provision was "necessary" to the trackage rights transaction, as the UTU suggests, would force the ICC into a never-ending maze of making affirmative necessity determinations for every term or provision of every proposed transaction. Such requirement would completely undermine the statutory goal of encouraging voluntary mergers and consolidations by, in essence, requiring the ICC to redesign every proposed transaction if the "necessity" for each and every term could not be adequately explained.

II. Pursuant To Section 11341(a), The Interstate Commerce Commission Has The Power To Relieve A Carrier Of RLA Procedures In The Implementation Of A Transaction Approved Under The ICA.

Respondents UTU and BLE assert that section 11341(a) cannot under *any* circumstances operate to relieve the parties to an approved transaction from compliance with RLA procedures. Both respondents contend that this is so because the ICC "lacks jurisdiction" over labor relations. BLE Br. at 28-34; UTU Br. at 31-50. In addition, UTU maintains that, in any event, even if the ICC once had authority to exempt transactions from the RLA under section 11341, Congress eliminated that authority in 1976 by passing the Railroad Revitalization and Regulatory Reform Act of 1976 ("4R Act"), Pub. L. No. 94-210, 90 Stat. 31 (1976). UTU Br. at 45-50. These assertions are not only without merit but are, more importantly, completely irrelevant to the present action.

Respondents have sought to raise these broad issues, which are the subject of their petitions for certiorari that are still pending (Nos. 85-983 and 85-997), in the guise of responding to petitioners' briefs. Despite the irrelevancy of these issues to this proceeding, we will address respondents' arguments in the event the Court chooses to broaden the scope of this proceeding. As we demonstrate below, it is well settled that the section 11341 exemption applies to the RLA, as well as every other statute impeding the implementation of an approved transaction. Moreover, the Court of Appeals, by remanding the orders to the ICC for a specific determination that the carriers are exempt from the RLA, has already decided that section 11341(a) does apply to the RLA. That implicit finding was the predicate for the unions' petitions in Nos. 85-983 and 85-997.

A. Prior to the passage of the 4R Act, it was settled that rail labor could not invoke the RLA as a source of independent right to negotiate the terms of implementation of ICC-approved transactions.

Respondents assert that Congress "intended labor relations matters arising from a consolidation to be resolved by the procedures of the Railway Labor Act." UTU Br. at 38. In short, respondents contend that the RLA is not a "law" from which carriers may be exempted by operation of section 11341(a).

In the light of plain statutory language, history, and case law precedent, respondents' position cannot be supported. For 40 years prior to the passage of the 4R Act, the ICC, the courts, rail labor, and the carriers all recognized that the ICC protected labor's interests by imposing labor protective conditions on its approval of transactions under the ICA. Once the ICC has performed that duty, the unions have no basis for asserting that they have a right, based on the RLA, to negotiate with carriers over the terms of implementation of ICC-authorized transactions.

The language of section 11341(a) is plenary, and gives the ICC exclusive jurisdiction to approve transactions and relieve carriers from restraints of *all* other laws as necessary to effectuate the transaction. As established in the extensive analysis of the legislative history contained in MKT's opening brief (at 19-32), which respondents have not refuted, section 11341(a) sweeps aside the provisions of the RLA to the extent they would impede the implementation of an approved transaction.[9]

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[9] Respondent UTU's use of the legislative history of section 11341(a) is misleading. See UTU Br. at 35-36. UTU correctly observes that *temporary* title (Title I) of the Emergency Railroad Transportation Act ("ERTA"), ch. 91, 48 Stat. 211 (1933), excluded the RLA from the laws that could be exempted in connection with actions *compelled* by the coordinator. But as we pointed out in our opening brief (at 22-24),

The courts have confirmed that carriers may be exempted from the RLA pursuant to section 11341(a). *Brotherhood of Locomotive Engineers v. Chicago & N.W. Ry.*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963). (MKT Op. Br. at 38.) In that case, the Eighth Circuit concluded that "Congress intended the ICC to have jurisdiction to prescribe the method for determining the solution of labor problems arising directly out of approved mergers," 314 F.2d at 431, and held that the ICC's approval of the transaction displaced the RLA. To hold otherwise "would be to disregard the plain language of § 5(11) conferring exclusive and plenary jurisdiction upon the ICC to approve mergers and relieving the carrier from all other restraints of federal law." *Id.* at 431-32.[10]

BLE v. CNW has been widely followed as a correct application of the law. Other courts repeatedly have applied the same reasoning to conclude that the RLA procedures do not govern the resolution of disputes arising out of the implementation of ICC-authorized transactions. *Missouri Pacific R.R.*, 782 F.2d at 111 (affirming "that MOPAC is exempted under § 11341(a) . . . from the requirements of the Railway Labor Act"); *Burlington Northern, Inc. v. American Railway Supervisors Ass'n*, 503 F.2d 58, 62-63 (7th Cir. 1974) (per curiam) (employee protection agreement adopted by ICC as condition to its approval of merger "not inconsistent with any provision of the Railway

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it is section 202, paragraph (15) of the *permanent* ERTA title (Title II) that is the predecessor of section 11341(a), and that provision contains no such exclusion. This distinction, we explained, reflects an evident congressional recognition that there is no exception for the RLA implicit in the predecessors to section 11341(a).

[10] Respondents' attempt to distinguish *BLE v. CNW* on the ground that the case centered on the enforcement of a voluntary agreement between a carrier and a union. BLE Br. at 35 n.16; UTU Br. at 42-43. This argument misses the mark. The court's decision was based on the ICC's authority; the genesis of the conditions sought to be enforced was irrelevant.

Labor Act, and if it were its provisions would be controlling"), *cert. denied*, 421 U.S. 975 (1975); *Nemitz*, 436 F.2d at 845-46 (the parties may not invoke RLA remedies to enforce the employee protective conditions imposed on an ICC-approved transaction); *United Transportation Union v. Norfolk & Western Ry.*, 332 F. Supp. 1170, 1174-75 (N.D. Ohio 1971) (requirements of ICC-approved job protection agreement supplant RLA rights); *see also Brotherhood of Locomotive Engineers v. Boston & Maine Corp.*, 788 F.2d 794 (1st Cir. 1986) (ICC authorization of transaction under 49 U.S.C. § 10505 exempts transaction from RLA), *cert. denied*, 55 U.S.L.W. 3232 (U.S. Oct. 7, 1986).

The same results were reached in cases arising in the airline industry, which is also subject to the RLA. Every court to consider the question has held that collective bargaining agreements, and employees' rights to insist the RLA procedures be followed in changing the terms of those agreements, must necessarily yield when the Civil Aeronautics Board authorized an airline consolidation under its own statutory authority. *International Association of Machinists and Aerospace Workers v. Northeast Airlines, Inc.*, 536 F.2d 975, 977 (1st Cir.), *cert. denied*, 429 U.S. 961 (1976); *American Airlines, Inc.*, 445 F.2d at 896 97; *Kent v. CAB*, 204 F.2d 263, 266 (2d Cir.), *cert. denied*, 346 U.S. 826 (1953).[11]

The ICC has also recognized that the provisions of the labor protective conditions displace the RLA procedures in resolving labor disputes in the context of implementing an ICC-approved transaction. In the landmark case of *Southern Ry.—Control—Central of Georgia Ry.*, 331 I.C.C. 151 (1967), the ICC considered the inter-relationship among its

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[11] The foregoing cases also refute respondents' assertion that because protective conditions are imposed on carriers, and not on the unions representing the employees of the carriers, the ICC cannot direct the unions to take (or to forego) any actions. UTU Br. at 37-38. *See, e.g., American Airlines, Inc.*, 445 F.2d at 897.

own protective conditions, the provisions of Washington Job Protection Agreement of 1936 ("WJPA"),[12] and the RLA. The ICC concluded that the substance of WJPA was included in the standard protective conditions it had imposed. *Id.* at 153. The mutual commitments of the WJPA parties were, therefore, to be enforced through the procedural mechanisms of the labor protective conditions, not the existing labor contract. *Id.* at 162-64. Thus, RLA procedures were already displaced; the provisions of WJPA, not the RLA, would govern the negotiation of an implementing agreement. *Id.* at 165. This is no less true when the substance of WJPA is imposed as a labor protective condition.[13]

Respondents predictably rely on *Texas & N.O. R.R. v. Brotherhood of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963), for the proposition that the ICC's jurisdiction under section 11341(a) is limited. BLE Br. at 46-47; UTU Br. at 41-42. But *Texas & N.O.* does not help them. There the issue was whether the anti-injunction provision of the Norris-LaGuardia Act, 29

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[12] The WJPA was a negotiated collective bargaining agreement among most of the nation's railroads and rail labor unions. It established both a schedule of compensatory benefits for employees affected by railroad consolidations and a general procedural mechanism for negotiating, and if necessary, arbitrating specific agreements to cover the workforce adjustments necessary to the implementation of approved transactions. 331 I.C.C. at 155-56.

[13] Although in the passage quoted by UTU (Br. at 40-41) and relied upon by BLE (Br. at 28-29), the ICC did note that the rights of employees under existing collective bargaining agreements, under WJPA, and under the protective conditions "are independent, separate, and distinct rights," 331 I.C.C. at 169, it simultaneously made clear that the mechanisms of the RLA itself played no part in the working out of the rearrangements necessary to effectuate authorized transactions. In the ICC's view, WJPA served the purpose of *furthering* transactions, "for without something comparable to it, section 6 of the Railway Labor Act (45 U.S.C. 156) would seriously impede mergers." 331 I.C.C. at 171.

U.S.C. §§ 101-115 (1982), was displaced by section 5(11). The court resolved the case by deciding there was no conflict, not that Norris-LaGuardia was paramount. Most importantly, the Fifth Circuit made clear its view that if there *was* a clash between the labor laws and section 5(11), "we would have to conclude that Norris-LaGuardia was preempted by section 5(11), even though section 5 is not labor legislation." 307 F.2d at 158.

B. The 4R Act did not provide that RLA procedures apply to determine the terms of implementation of an approved transaction.

UTU contends that, in any event, any authority the ICC may have had under section 11341(a) to exempt transactions from the RLA was eliminated in 1976 as a result of a provision in the 4R Act purportedly guaranteeing to rail employees the right to engage in collective bargaining, under the procedures of the RLA, over the implementation of ICC-authorized transactions. The mechanism ostensibly accomplishing this result is the 4R Act's reference to a provision in the Rail Passenger Service Act of 1970 ("Amtrak Act"), Pub. L. No. 91-518, 84 Stat. 1327 (1970), which in turn implicates language in the protective conditions adopted by the Secretary of Labor under that statute.[14] Those protective conditions direct that "all collective bargaining and other rights . . . of the railroad's [affected] employees . . . shall be preserved unless changed by future

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[14] Section 402(a) of the 4R Act amended section 5(2)(f) of the ICA (the predecessor of section 11347) to read, in pertinent part:

> [T]he Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected . . . . Such arrangement shall contain provisions no less protective of the interests of employees than those heretofore imposed pursuant to [§ 5(2)(f)] and those established pursuant to section 405 of the Rail Passenger Service Act (45 U.S.C. 565).

90 Stat. 62.

collective bargaining agreements[.]"[15] UTU sees in this chain (1) a statutory directive that actions taken under protective conditions imposed by the ICC pursuant to section 11347 cannot have the effect of altering existing collective bargaining arrangements without employee consent attained through RLA procedures; and, thereby, (2) the implied removal of the RLA from the exemption provision of section 11341(a).

In fact, the 4R Act has no such broad effect. The Amtrak Act provision was derived from a provision of the Urban Mass Transportation Act of 1964 ("UMTA"), Pub. L. No. 88-365, 78 Stat. 302 (1964) (now codified at 49 U.S.C. app. §§ 1601-1618 (1982)), which authorized federal financial aid to state and local governments for the improvement of urban mass transit systems. UMTA was passed at a time when many private transit companies were in precarious financial condition; the statute was intended, in part, to assist local governments to acquire such failing companies so that local communities would not be without mass transit. *See Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union*, 457 U.S. 15, 17 (1982).

Congress recognized that many states denied public employees the right to bargain collectively, and was concerned that a federally sponsored shift from private to public ownership not become the occasion for the loss of existing collective bargaining rights under state law. Accordingly, Congress in section 13(c) of UMTA, 49 U.S.C. app. § 1609(c), required that labor protective arrangements must be imposed that would ensure "the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; [and] the continuation of collective bargaining rights[.]" The Secretary of Labor was

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[15] This language is found in Art. I, § 2 of the "Appendix C-1 conditions," which are discussed in the text below.

instructed to certify only those labor protective arrangements that preserved the collective bargaining benefits and rights. *See Jackson Transit Authority*, 457 U.S. at 17-18. Thus, although the language of section 13(c) is facially broad, its well-understood meaning is specific and circumscribed.

The language of UMTA § 13(c) reappeared several years later in the Amtrak Act, which created the National Railroad Passenger Corporation ("Amtrak") and laid the foundation for a national rail passenger system. Section 405 of the Amtrak Act, 45 U.S.C. § 565 (1982), mandated that the Secretary of Labor certify that fair and equitable arrangements have been made for the protection of employees affected by private railroads' discontinuance of intercity rail passenger service—*i.e.*, the turnover of passenger operations to Amtrak. In language adopted verbatim from section 13(c) of UMTA, section 405(b) of the Amtrak Act directed that the Secretary of Labor may certify only those labor protective arrangements that, *inter alia*, provide for the preservation of benefits under existing collective bargaining agreements and for the continuation of collective bargaining rights.

Congress' use of the identical language of UMTA § 13(c) in the Amtrak Act indicates that it intended to provide protections for Amtrak employees comparable to those established by section 13(c). Moreover, the national legislative director of the UTU stated in support of such protection that it was "designed to serve the identical policy expressed in" UMTA. *Supplemental Hearings on H.R. 17849 and S. 3706 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. 122 (1970). And the Secretary of Labor, whose job it would be to administer the provision, understood "that the coverage under the protective arrangements provision . . . is substantially of the same scope as the protective arrangements provision" of UMTA. *Id.* at 65.

The protective conditions mandated by the Amtrak Act were developed and certified in 1971 by Secretary of Labor Hodgson. The provision of Appendix C-1[16] that embodies the Amtrak Act's directive to provide for the continuation of collective bargaining rights is Article I, § 2, which states:

> The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

The rail labor unions assuredly did not interpret Article I, § 2 of Appendix C-1 as a guarantor of newly reinvigorated RLA § 6 negotiating rights. To the contrary, the unions attacked Appendix C-1 as being insufficiently protective of employee interests. *Congress of Railway Unions v. Hodgson*, 326 F. Supp. 68 (D.D.C. 1971). This litigation would have been thoroughly beside the point if Appendix C-1 already contained a provision assuring employees of the right to ignore the protective conditions altogether and seek to negotiate implementing agreements under the procedures of the RLA. Yet rail labor claimed no such right.

As stated above, section 402(a) of the 4R Act amended section 5(2)(f) of the ICA to require that the "fair and equitable arrangement to protect the interests of the railroad employees affected" by an ICC-authorized transaction "contain provisions no less protective of the interests of employees than those heretofore imposed pursuant to [§ 5(2)(f)] and those established pursuant to section 405 of

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[16] The conditions are known as "Appendix C-1" because they were attached as Appendix C-1 to the standard train discontinuance contract that Amtrak entered into with each rail passenger carrier.

the Rail Passenger Service Act (45 U.S.C. 565)." 90 Stat. 62 (codified at 49 U.S.C. § 11347).[17] It is now undisputed that the Appendix C-1 conditions constitute the conditions "established pursuant to" section 405 of the Amtrak Act. *New York Dock Ry. v. United States*, 609 F.2d 83, 93 (2d Cir. 1979).

Nothing in the 4R Act, or its legislative history, suggests that Congress intended that the protections established by Secretary Hodgson in Article I, § 2 take on new or enlarged meaning when imposed by the ICC, pursuant to the command of the 4R Act, in subsequent rail transactions.

The policy underlying the 4R Act also precludes such a result. The 4R Act amended the consolidation provisions of the Interstate Commerce Act "to encourage mergers, consolidations and joint use of facilities that tend to rationalize and improve the Nation's rail system[.]" S. Rep. No. 499, 94th Cong., 1st Sess. 20 (1975), *reprinted in* 1976 U.S. Code Cong. & Ad. News 14, 34; *see Lamoille Valley R.R. v. ICC*, 711 F.2d 295, 301 (D.C. Cir. 1983). Congress expected that the amended 49 U.S.C. § 5(2)(f) (now 49 U.S.C. § 11347)—an integral part of the railroad consolidation regulatory framework—and the labor protective conditions it required would facilitate railroad transactions, not frustrate them. Resort to the protracted RLA negotiation process would negate this explicit congressional policy.

CONCLUSION

The Court should reverse the Court of Appeals' decision.

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[17] This provision of the 4R Act, proposed in the House of Representatives and added to the Senate bill in conference, was a "last-minute addition" without specific legislative history. *New York Dock Ry. v. United States*, 609 F.2d 83, 93 (2d Cir. 1979).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

INTERSTATE COMMERCE COMMISSION and
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
Petitioners,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS and
UNITED TRANSPORTATION UNION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AND NATIONAL RAILWAY LABOR CONFERENCE AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

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BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AND NATIONAL RAILWAY LABOR CONFERENCE AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

INTEREST OF *AMICI CURIAE*

The Association of American Railroads is the trade association for the nation's railroads. Its members employ approximately 94% of the workers, operate approximately 92% of the trackage, and account for approximately 97% of the freight revenues of all railroads in the United States. The Association represents its member railroads before courts, agencies, and the Congress when matters of common concern are at issue.

Almost all of the nation's Class I railroads are members of the National Railway Labor Conference. The Conference represents member railroads both in national collective bargaining pursuant to the Railway Labor Act with unions representing their employees and in regard to other labor-management relations problems that are of concern to the railroads generally. In addition, the Conference serves as a clearing house of information regarding, and renders assistance and advice to member railroads concerning, employee protection issues that arise out of mergers and other railroad transactions governed by the Interstate Commerce Act.

This case raises the question whether labor-management disagreements arising out of rail carrier efforts to implement transactions approved by the Interstate Commerce Commission are to be resolved according to the procedures prescribed by the Interstate Commerce Act, or the procedures prescribed by the Railway Labor Act. This question is critical. Under the Interstate Commerce Act such disputes are resolved promptly by mandatory, binding arbitration; under the Railway Labor Act they may lead to strikes and other forms of self-help, interfering with interstate commerce and possibly blocking altogether the realization of transactions held to be in the public interest.

The decision of the court of appeals in this case misconstrues the relationship between the two statutes and misunderstands the effect of an approval by the Commission under the Interstate Commerce Act. It threatens serious interference with and delay to the ability of railroads to implement not only Commission-approved trackage rights transactions by operation with their own crews as traditionally has been done—which is the subject of this case—but also other kinds of transactions approved by the Commission. The AAR and the NRLC accordingly file this brief in support of the petitioners herein.[1]

STATEMENT

This case has its beginning in the approval by the Interstate Commerce Commission of the merger of the Union Pacific ("UP") and Missouri Pacific ("MP") railroads. To ameliorate the anticompetitive effect of that merger, the Commission simultaneously granted two competing carriers—the Missouri-Kansas-Texas ("MKT") and the Denver Rio Grande Western ("DRGW")—rights to operate their trains over tracks owned by MP.[2] And to protect the interests of any employees who might be adversely affected by the exercise of those rights, the Commission imposed on the carriers certain "employee

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[1] Written consents from all parties to the filing of this brief have been filed with the Clerk of the Court.

[2] It has long been "a well-recognized practice among carriers to agree as to trackage rights and privileges between one another for the common use of a part of the line of one in such a manner as to make the tracks subject to the agreement a part of both roads." *Dixie Cotton Oil Co.* v. *St. Louis, I. M. & S. Ry.*, 27 I.C.C. 295, 297 (1913). The acquisition of trackage rights by a carrier "constitute[s] an 'extension' of its own railroad" and "serves the same purpose as would the acquisition of such lines by purchase or the construction by it of a like extension * * *." *Transit Comm'n* v. *United States*, 289 U.S. 121, 128-129 (1933). The Transportation Act of 1940 gave the Commission "explicit powers over trackage rights," including "fixing terms and conditions * * * for any trackage agreements entered into * * *." *Thompson* v. *Texas Mexican R. Co.*, 328 U.S. 134, 146 (1946).

protection" obligations, more fully described below. *Union Pacific-Control-Missouri Pacific*, 366 I.C.C. 462 (1982), *aff'd, Southern Pacific Transp. Co.* v. *ICC*, 736 F.2d 708 (D.C. Cir. 1984).

The trackage rights applications submitted to and approved by the Commission stated that the MKT would use its own employees to man its trains, and that the DRGW would have the option of doing so. (Pet. App. 62a.)[3] When the tenant carriers exercised their trackage rights the Brotherhood of Locomotive Engineers ("BLE") and the United Transportation Union ("UTU") protested to the Commission on behalf of the MP employees. They argued that the tenants' operation of their own trains with their own crews over MP tracks amounted to a change in the collective bargaining agreements relating to the working conditions of MP employees; that such a change could be lawfully effected only through collective bargaining pursuant to the major dispute procedures of the Railway Labor Act; and that the Commission has no power under the Interstate Commerce Act, to authorize a transaction effecting such a change without resort to the procedures of the Railway Labor Act. (Pet. App. 57a-59a.)[4]

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[3] "Pet. App." references are to the Appendix to the petition of the Interstate Commerce Commission. Operation by the tenant carrier "with its own engines and crews * * * is the usual method by which one carrier uses tracks of another." *Gulf, M. & N. R. Co. Abandonment of Operations*, 233 I.C.C. 294, 297 (1939). Indeed, it has been held that an agreement under which the owner carrier "would furnish all necessary locomotives and crews" is not a true trackage-rights agreement, which "necessarily include[s] an operating right" in the tenant carrier. *Chicago & E.I. R. Co. Trackage Rights*, 254 I.C.C. 603, 604, 605 (1943).

[4] Both the BLE and the UTU participated in the initial ICC proceeding and opposed the trackage rights applications generally. Neither, however, opposed the applications insofar as they would allow the tenants to use their own crews and neither raised that issue on appeal to the D.C. Circuit from the approval of the applications. Moreover, those unions also represent employees of the tenant carriers. The record shows that the unions, on behalf of those

In addition, the UTU threatened to strike the MP unless the MP refused to permit MKT crews to operate MKT trains on MP tracks. That threatened strike was enjoined. *Missouri Pac. R.R.* v. *UTU*, 580 F. Supp. 1490 (E.D. Mo. 1984), *aff'd*, 782 F.2d 107 (8th Cir. 1986), *pdg. on pet. for a writ of cert.*, No. 85-1054.

The Commission rejected the unions' arguments. It concluded, among other things, that the tenants were free to use their own crews, even if that did amount to a change in the working conditions of MP employees, because the Railway Labor Act did not apply but had been superseded for the reasons stated at length in *Brotherhood of Locomotive Engineers* v. *Chicago and North Western Ry.*, 314 F.2d 424, 430-31 (8th Cir. 1963). (Pet. App. 60a.)

A divided court of appeals found the Commission's explanation inadequate. It sought to distinguish the case on which the Commission relied, and it vacated the Commission's orders on the asserted ground that the agency "did not give a shred of reasoning to support its view that completion of the transactions required shielding crew selection from the Railway Labor Act." (Pet. App. 19a, footnote omitted.)

INTRODUCTION AND SUMMARY OF ARGUMENT

1. *Introduction.* The Interstate Commerce Act contains, in Chapters 109 and 113 of Title 49 of the U.S. Code, a comprehensive and meticulous scheme for the regulation of changes in rail carrier control or operation. Chapter 109 ("Licensing") governs the extension or construction of a line of railroad (§ 10901), the sale of a line of railroad from a carrier to a noncarrier (*id.*), the abandonment of a line or the discontinuance of operations over a line (§ 10903), and the purchase of a line noticed and approved for abandonment (§ 10905). Chap-

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employees, have entered into agreements with the MKT—pursuant to the procedures prescribed by the Interstate Commerce Act—regarding the crewing of MKT's trains used in trackage-rights operations.

ter 113 ("Combinations") governs the consolidation and merger of carriers, purchases or leases or contracts to operate the properties of other carriers, acquisitions of control, and acquisitions of trackage rights over another carrier's lines (§ 11343). Before any of these actions may be taken the approval of the Interstate Commerce Commission is required.[5]

Under that statutory scheme the Commission for nearly 50 years has had power to impose employee protections as a condition of its approval of most of the actions just described. Thus, before 1940 the Commission in its discretion and without specific authority imposed protections as a condition of its approval of transactions now falling under Chapter 113. *United States* v. *Lowden*, 308 U.S. 225 (1939). Such protections were required after the Transportation Act of 1940, which "made mandatory with respect to unifications the protections for workers that had previously been discretionary." *ICC* v. *Railway Labor Exec. Ass'n*, 315 U.S. 373, 379 (1942) (footnote omitted). Similarly, before 1976 the Commission had and exercised discretionary power to impose conditions under the predecessors to Chapter 109 provisions. See *id.* In that year the Railroad Revitalization and Regulatory Reform Act amended those provisions to require protections in the case of abandonments (§ 10903) and to codify the Commission's discretion in the case of acquisitions and extensions or constructions of rail lines (§ 10901).[6] See *Railway Labor Exec. Ass'n* v. *ICC*, 784 F.2d 959, 945 (9th Cir. 1986).

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[5] Under § 10505, the Commission may exempt "a person, class of persons, or a transaction or service" from requirements of the Act, including those contained in Chapters 109 and 113, but such an exemption does not "relieve a carrier of its obligations to protect the interests of employees as required" in those chapters (§ 10505(g)). Hence, the preemptive effect upon the Railway Labor Act is the same regardless of whether the Commission approves a transaction under applicable provisions of Chapter 109 or 113 or exempts the transaction from those provisions.

[6] The one exception to the foregoing is that the Commission has no power to impose protections in connection with the purchase of a

Chapters 109 and 113 share more than a common history of the Commission's power to impose protections. Both chapters have the goal of an efficient and economic rail transportation system, see *ICC* v. *Railway Labor Exec. Ass'n, supra*, 315 U.S. at 376; the justifications for protections as recognized by this Court apply equally to both chapters, see *id.*, 315 U.S. at 377; the protections that the Commission imposes under both chapters are virtually identical;[7] and the Railway Labor Act, if it applied, would frustrate and possibly block altogether transactions under both chapters approved by the Commission as being in the public interest. For these reasons the *amici* Association of American Railroads and National Railway Labor Conference believe that the Railway Labor Act is overridden by the Interstate Commerce Act with respect to *all* transactions subject to Commission approval, whether falling under Chapter 109 or 113.

This case involves a trackage rights transaction, covered by Chapter 113. As we show below, there is an additional reason for concluding that the Railway Labor Act is superseded with respect to Chapter 113 transactions—namely, the provision in § 11341(a) that carriers participating therein are "exempt * * * from all other laws * * * as necessary to * * * carry out the transaction." But neither the presence of that provision in Chapter 113, nor our reliance on it in this case, detracts from the force of the arguments that the Railway Labor

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line approved for abandonment under § 10905 (added by the 1976 Act but significantly amended by the Staggers Rail Act of 1980, Pub. L. No. 96-448, § 402(c), 94 Stat. 1895, 1942-45). *Simmons* v. *ICC*, 766 F.2d 1177 (7th Cir. 1985); *Simmons* v. *ICC*, 760 F.2d 126 (7th Cir. 1985).

[7] Compare *New York Dock Ry.—Control—Brooklyn Eastern District*, 360 I.C.C. 60, *affirmed, New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979) (merger protections under Chapter 113), with *Oregon Short Line R.R.—Abandonment—Goshen*, 360 I.C.C. 91 (1979) (abandonment protections under Chapter 109).

Act is superseded by Chapter 109 as well.[8] The *amici* make this point out of a concern that a decision by this Court favorable to petitioners in this case that relied on the presence of § 11341(a) in Chapter 113 could conceivably be construed by lower courts to prejudice the position of carriers in cases arising under Chapter 109.[9]

2. *Summary.* We show in Part I below that the court of appeals erred in ruling that the Commission's explanation for its conclusion was inadequate. The Commission's decision set forth the union's claims, and then the reasons for rejecting them. It relied heavily on, and adopted as its own, the reasoning behind *Brotherhood of Locomotive Engineers* v. *Chicago and North Western Ry.*, 314 F.2d 424 (8th Cir. 1963), which held that the Railway Labor Act is superseded by the Interstate Commerce Act in cases such as this one. In short, "[t]he path which it followed can be discerned." *Colorado Interstate Gas Co.* v. *FPC*, 324 U.S. 581, 595 (1945).

In Part II we address the merits of the Commission's conclusions. We show that the procedures for resolving disputes under that Act, which at their end contemplate the union's right to strike if its demands are not met, must yield to the mandatory arbitration provisions prescribed by the Commission as the means for resolving

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[8] We are supported in our view of the preemptive effect of Chapter 109 by the experience under the Civil Aeronautics Act. Labor protections imposed on air carriers under that Act have been held to supersede inconsistent agreements under, or provisions of, the Railway Labor Act without reference to any express statutory exemption. *E.g.*, *Kent* v. *CAB*, 204 F.2d 263 (2d Cir. 1953); *accord*, *International Ass'n of Machinists* v. *Northeast Airlines*, 473 F.2d 549 (1st Cir. 1972); *International Ass'n of Machinists* v. *Northeast Airlines*, 536 F.2d 975 (1st Cir. 1976); *American Airlines* v. *CAB*, 445 F.2d 891 (2d Cir. 1971).

[9] Pending cases involving the relationship between Chapter 109 (either directly or indirectly by reason of a § 10505 exemption) and the Railway Labor Act include *Railway Labor Exec. Ass'n* v. *Butte, Anaconda and Pac. R.R.*, No. 85-3875 (9th Cir.) and *Railway Labor Exec. Ass'n* v. *Staten Island R.R.*, —— F.2d —— (2d Cir., No. 85-7483, May 22, 1986).

disputes stemming from carrier efforts to implement transactions the Commission has approved as being in the public interest. A contrary result would mean that labor, already entitled in many instances under the Interstate Commerce Act to federally imposed protections unparalleled elsewhere in American industry, would have a veto power over the implementation by carriers of approved transactions. As a host of lower court decisions supporting our view demonstrates, Congress meant to encourage rail consolidations under the Interstate Commerce Act, and could not have meant to frustrate that goal by giving rail labor, in addition to the statutorily mandated protections, the right to delay or block those transactions altogether.

3. In Part III we support the Commission's construction of § 11341(a) as self-executing. That section of the Interstate Commerce Act requires no action by the Commission whatever. The factors required to be considered by the Commission appear in §§ 11343 and 11344. Once the Commission after considering those factors approves a transaction, a question may subsequently arise as to whether or not it is "necessary" under § 11341(a) for the carrier participants to be relieved of the operation of some other law, but the answer will ordinarily not depend on whether the Commission has made any "necessity" determination as part of its decision approving the transaction in the first place.

4. Finally we show that the unions err in contending that the Railroad Revitalization and Regulatory Reform Act of 1976 amended the Interstate Commerce Act to somehow revivify the role of the Railway Labor Act in the implementation of ICC-approved transactions. The provision in the 4-R Act on which the unions rely was added without a shred of debate and it is inconceivable that Congress was effecting so major a change in the law, and introducing so large a hurdle to the accomplishment of the goals of the Interstate Commerce Act, without a word being said about the matter by any member of Congress or any representative of rail labor or management.

ARGUMENT

I. THE COMMISSION ADEQUATELY EXPLAINED ITSELF

The Commission's reasoning in its October 19, 1983 decision "may reasonably be discerned." *Bowman Transp., Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285-86 (1974). It set out the issues for decision by stating the unions' claims: "that this Commission has no jurisdiction over crew assignment disputes and that they must be settled under the procedures of the Railway Labor Act" and that the Commission's approval of the trackage rights transaction could not "immunize [that] transaction from the requirements of the RLA" or authorize the carriers to make "unilateral changes of collective bargaining agreements." (Pet. App. 57a.) The Commission than went on to reject those arguments, ruling that its approval of a transaction covered by § 11343—

> "exempts such a transaction from the requirements of all laws as necessary to permit the transaction to be carried out, and includes an exemption from the requirements of the RLA. *See Brotherhood of Loc. Eng.* v. *Chicago & North Western Ry. Co.*, 314 F.2d 424, 432 (8th Cir. 1963), *cert. denied* 375 U.S. 819 (1963)." (Pet. App. 59a.)

It also ruled (*id.* 60a):

> "To the extent that existing working conditions and collective bargaining agreements conflict with a transaction which we have approved, those conditions and agreements must give way to the implementation of the transaction."

And then the Commission explained why (*id.*):

> "If our approval of a transaction did not include authority for the railroads to make necessary changes in working conditions, subject to payment of specified benefits, our jurisdiction to approve transactions requiring changes of the working conditions of any employees would be substantially nullified. Such a result would be clearly contrary to

> congressional intent. The discussion of this point in *Brotherhood of Loc. Eng.* [v. *Chicago and North Western Ry. Co.*, 314 F.2d 424, 430-31 (8th Cir. 1963)] is persuasive and we conclude that this reasoning is unaffected by the enactment of the 4-R Act."

The Commission's two citations to the Eighth Circuit's decision in the *Chicago and North Western* case (hereinafter "*BLE* v. *CNW*"), and its adoption of the reasoning there as its own, make clear the basis for its finding that the crew selection provisions of the approved trackage rights agreements were exempt from the provisions of the RLA.[10] In short, while the organization of the decision of the Commission may not be flawless, "[t]he path which it followed can be discerned." *Colorado Interstate Gas Co.* v. *FPC*, 324 U.S. 581, 595 (1945). See also *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 532-33 (1946); *ICC* v. *Columbus & Greenville Railway*, 319 U.S. 551, 555 (1943).

II. THE COMMISSION'S CONCLUSIONS WERE CORRECT

A. The Interstate Commerce Act Provides A Comprehensive Scheme Encouraging Rail Consolidations And Protecting the Interests of Labor.

The Interstate Commerce Act favors rail mergers and other types of rail consolidations. That has been true for over 60 years. The post-World War I period was a time of great uncertainty and financial crisis for the nation's

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[10] See *Shepard* v. *NLRB*, 459 U.S. 344, 348-52 (1983), in which this Court upheld the Board's decision to forgo a requirement of reimbursement as a remedy for violation of § 8(e) of the National Labor Relations Act. The Board's reasoning on that issue was confined to a footnote and was "something less than a model of precise expository prose," but the Court was able to glean "the sense of the Board's explanation," in part by a reading of a decision that the Board had merely cited in the explanatory footnote. *Id.* 350.

railroads, largely because of waste and inefficiency caused by extensive duplication of facilities and services.[11] Congress responded with the Transportation Act of 1920, 41 Stat. 456, where "consolidation of the railroads of the country, in the interest of economy and efficiency, became an established national policy * * *." *United States* v. *Lowden*, 308 U.S. 225, 232 (1939). That Act, however, left consolidation largely to the Commission's efforts, and proved insufficient to its end. Congress accordingly reaffirmed and reinforced the national policy by giving rail carriers principal authority to initiate unifications in the Transportation Act of 1940, 54 Stat. 898, the chief goal of which was " 'to facilitate merger and consolidation in the national transportation system.' " *Brotherhood of Maintenance of Way Employes* v. *United States*, 366 U.S. 169, 173 (1961).

The Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, continued pursuit of the national policy. It "was an attempt to restructure the railroad industry in the face of chronic financial losses and line closures." *Railway Labor Exec. Ass'n* v. *ICC*, 784 F.2d 959, 965 (9th Cir. 1986). It sought to promote an efficient rail transportation system through (among other things) "the encouragement of efforts to restructure the system on a more economically justified basis, including planning authority [for mergers] in the Secretary of Transportation, an expedited procedure for determining whether merger and consolidation applications are in the public interest, and continuing reorganization authority * * *." § 101(a)(2), 90 Stat. 33, 45 U.S.C. § 801(a)(2).[12]

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[11] See 1 I. L. Sharfman, *The Interstate Commerce Commission* 172-173 (1931).

[12] See Senate Rep. No. 94-499, 94th Cong., 1st Sess. 20-21 (1975), *reprinted in* 1976 U.S. Code Cong. & Ad. News 14, 34 ("Title IV of this bill is intended to encourage mergers, consolidations and joint use of facilities that tend to rationalize and improve the

Throughout this entire period the Commission's approval has been required for mergers, consolidations and other transactions falling within what is now § 11343. The Commission's jurisdiction over these transactions is "exclusive," and carriers participating in approved transactions are "exempt * * * from all other law * * * as necessary to let that person carry out the transaction * * *." § 11341(a).

A more efficient and hence viable rail transportation system will ultimately benefit the public at large and preserve jobs for rail labor. Yet Congress has long recognized that the economies it sought to encourage through rail mergers are often achieved by the abolishment of duplicative facilities, resulting in the dismissal of employees or their displacement to lower paying jobs.[13] Its response, since the Transportation Act of 1940, has been to require the Commission in determining whether to grant an application subject to § 11343 to consider (among other things) "the interest of carrier employees affected by the proposed transaction," § 11344(b)(1)(D), and if it approves the application the Commission "shall require the carrier to provide a fair arrangement" to protect employees adversely affected by the transaction. § 11347. The Commission accordingly has established a comprehensive set of "protections" to be afforded em-

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Nation's rail system, and requires the Commission * * * to reach a [prompt] decision * * *." Section 401 "empowers the Secretary to develop plans, proposals and recommendations for mergers, consolidations and other coordination projects * * *.").

[13] See *Railway Labor Exec. Ass'n* v. *United States*, 339 U.S. 142, 147-148 (1950), noting "a widespread awareness in the railroad industry that many of the economies to be gained from consolidations * * * could be realized only at the expense of displaced railroad labor" and that "[t]he legislative history of § 5(2)(f) [now § 11347] shows that one of its principal purposes was to provide mandatory protection for the interests of employees affected by railroad consolidations."; *Division No. 14, Order of R.R. Tel.* v. *Leighty*, 298 F.2d 17, 17-18 (4th Cir. 1962).

ployees adversely affected as a result of approved rail mergers, consolidations and common control transactions,[14] and lease and trackage rights transactions.[15]

Under these protective conditions, an employee who is dismissed from a job or displaced to a lower paying position as a result of the approved transaction will continue to receive, generally for six years, the equivalent of the wage he or she was earning at the time of the adverse effect, indexed in accordance with subsequent general wage increases; moving expenses are provided if relocation is necessary; and transfers of work are subject to "implementing agreement" provisions regarding the allocation of seniority or other contract rights of affected employees. In addition, if the carrier and the union representing its affected employees are unable to come to terms over an implementing agreement, the parties must submit their dispute to expedited, binding arbitration. See *New York Dock Ry.* v. *United States*, *supra*, 609 F.2d at 94.

B. The Railway Labor Act, If It Applied, Would Interfere With and Could Defeat the Goals of the Interstate Commerce Act.

The carefully constructed statutory scheme we have just described would be set at naught if unions could insist that carriers, in addition to securing the approval of the Commission to engage in the transactions listed in § 11343, and complying with the employee protective

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[14] *New York Dock Ry.—Control—Brooklyn Eastern District*, 360 I.C.C. 60, 84-90 (1979), *affirmed*, *New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979). The Second Circuit's decision in this case contains an extensive history of the conditions imposed over the years by the Commission.

[15] *Norfolk and Western Ry.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), *as modified by Mendocino Coast Ry.—Lease and Operate—California Western R.R.*, 360 I.C.C. 653 (1980), *affirmed*, *Railway Labor Exec. Ass'n* v. *United States*, 675 F.2d 1248 (D.C. Cir. 1982).

conditions imposed by the Commission under § 11347, must also follow the "major dispute" procedures of the Railway Labor Act ("RLA") before consummating a transaction that the Commission has approved as being in the public interest.

"Major" disputes arise under that Act when labor or management seeks to change the rates of pay, rules, or working conditions established in existing collective bargaining agreements. *Elgin, Joliet & Eastern Ry.* v. *Burley*, 325 U.S. 711, 723 (1945). Because the "major purpose of Congress in passing the Railway Labor Act was 'to provide a machinery to prevent strikes,'" *Texas and New Orleans R.R.* v. *Brotherhood of Railway and Steamship Clerks*, 281 U.S. 548, 565 (1930), the Act requires the parties to such a dispute to follow certain prescribed procedures designed to maximize the possibility of reaching agreement. Those procedures are "purposely long and drawn out," *Railway Clerks* v. *Florida East Coast Ry.*, 384 U.S. 238, 246 (1966), and their exhaustion is "almost an interminable process." *Detroit and Toledo Shore Line R.R.* v. *UTU*, 396 U.S. 142, 149 (1969).[16] It is not un-

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[16] In *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969), this Court described the Act's "detailed framework to facilitate the voluntary settlement of major disputes";

> "A party desiring to effect a change of rates of pay, rules, or working conditions must give advance written notice. § 6. The parties must confer, § 2 Second, and if conference fails to resolve the dispute, either or both may invoke the services of the National Mediation Board, which may also proffer its services *sua sponte* if it finds a labor emergency to exist. § 5 First. If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding arbitration, which can take place, however, only if both consent. §§ 5 First, 7. If arbitration is rejected and the dispute threatens 'substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President,' who may create an emergency board to investigate and report on the dispute. § 10."

common for the procedures to drag on for two years or more. At their ultimate conclusion, however, the parties may resort to self-help, including a strike by a union if its demands have not been met. *E.g.*, *Railway Clerks* v. *Florida East Coast Ry.*, *supra*, 384 U.S. at 243-44.

Those demands may be inconsistent with the carrier's ability to implement the transaction approved by the Commission, as an example may illustrate. Recently the Commission approved the common control of three railroads in the Northeast.[17] It did so because common ownership would produce "substantial" public benefits in several areas, including operating efficiencies to be "achieved through consolidation of maintenance and repair facilities."[18] Yet when the carriers sought to consolidate their facilities the International Association of Machinists sued to prevent them from doing so, arguing that the carriers were obliged to bargain under the RLA over demands by the union that each of three carriers add to its collective bargaining agreement a provision effectively barring the transfer of repair work from one carrier to another. Those demands, if agreed to by the carriers, would have forbidden the consolidation.[19]

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[17] *Guilford Transp. Ind., Inc.—Control—Boston and Maine Corp.*, 366 I.C.C. 292, 338 (1982), *aff'd in relevant part, Lamoille Valley R.R.* v. *ICC*, 711 F.2d 295 (D.C. Cir. 1983); *Guilford Transp. Ind., Inc.—Control—Delaware and Hudson Ry. Co.*, 366 I.C.C. 396 (1982), *aff'd in relevant part, Central Vermont Ry.* v. *ICC*, 711 F.2d 331 (D.C. Cir. 1983).

[18] 366 I.C.C. at 338; see also *id.* at 402.

[19] Complaint in *International Assoc. of Machinists* v. *Boston and Maine Corp.*, No. 84-3703-T (D. Mass.). A Stipulated Order of Dismissal ended the case on February 24, 1986.

Another recent example (though arising under Chapter 109) can be found in *Railway Labor Exec. Ass'n* v. *Staten Island R.R.*, —— F.2d —— (2d Cir., No. 85-7483, May 22, 1986). In December 1984 the carrier applied for ICC approval of a proposed transaction. Four unions *later* served bargaining demands that the carrier pro-

In other cases, a union may strike if a carrier implements an approved transaction without first seeking to change the existing collective bargaining agreement through the RLA major dispute procedures, as would have occurred in connection with the approved transaction involved in this case but for the strike injunction recently affirmed by the Eighth Circuit. See p. 4 *supra*. If the carrier should be required to utilize the RLA procedures, the result at a minimum will be delay in its ability to implement the approved transaction. And if at the end of those procedures the union has not agreed to change the collective bargaining agreement, then the carrier will face the choice either of foregoing what the Commission has approved as being in the public interest, or taking a strike.

C. The ICC, Following *BLE* v. *CNW*, Rightly Ruled That the Railway Labor Act Is Superseded.

Because the application of the RLA could defeat the Interstate Commerce Act scheme for approving mergers, etc. subject to employee protections, the Eighth Circuit, in the *BLE* v. *CNW* decision relied on by the Commission, ruled that the RLA was among the laws from which carrier participants in ICC-approved transactions are exempt. It relied in turn on the legislative history

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vide them 6 months' advance notice of such proposed transactions. The ICC issued an order of approval on April 24, 1985 and the next day the unions sued to enjoin the transaction, arguing that the carrier in implementing the approved transaction had violated the RLA by changing the *status quo* during the pendency of bargaining demands. The complaint was dismissed for failure to state a claim upon which relief may be granted.

On many rail properties unions recently have served bargaining demands that if agreed to by the carriers would block or impede ICC-approved transactions. The carriers generally view the demands as nonmandatory subjects of bargaining. Some litigation on that score has commenced (*e.g.*, *Burlington Northern R.R.* v. *UTU*, No. 86-5013-CV-SW-C (D.Mo.)) and more is inevitable.

of the Transportation Act of 1940, which as noted above amended the Interstate Commerce Act to make employee protective conditions mandatory in Chapter 113 transactions. In passing that Act Congress rejected a proposed amendment—the "Harrington" amendment—that would have forbidden carriers from abolishing jobs or impairing existing employment rights as a result of a merger or other transaction needing the Commission's approval under § 11343. That amendment, the Eighth Circuit noted, "'threatened to prevent all consolidations to which it related.'" *Id.* at 430 (quoting *Railway Labor Executives' Ass'n* v. *United States*, *supra*, 339 U.S. at 151).[20] Its defeat fortified the conclusion that Congress intended the ICC-prescribed protective conditions rather than the RLA to govern the adjustments caused by merger implementations, for if the RLA were to govern it would allow the nullification of Commission-approved transactions:

> "[T]he ICC power to authorize mergers would be completely ineffective if authority to adjust work realignments through fair compensation did not exist. * * * Under the Railway Labor Act in a major dispute employees cannot be compelled to accept or arbitrate as to new working rules or conditions. * * * Thus under the Railway Labor Act provisions, it is possible for either party to completely block any change in working conditions by refusing to agree to a change and by refusing to arbitrate. Like the Harrington amendment, the Railway Labor Act, if it applied, would threaten to prevent many consolidations." *Id.* at 430-431.

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[20] This Court, in *Brotherhood of Maintenance of Way Employes* v. *United States*, *supra*, 366 U.S. at 173-77, relied heavily upon the legislative history growing out of the Harrington amendment in rejecting a union contention that the predecessor of § 11347 required a "job freeze," and holding that compensatory employee protections are adequate.

The Eighth Circuit accordingly concluded that the RLA was one of the laws from which carrier participants in ICC-approved transactions are exempt under § 11341(a) in implementing those transactions. *Id.* at 431-32.[21]

That decision does not stand alone. Others to the same effect include *Brotherhood of Loc. Eng.* v. *Boston & Maine Corp.*, 122 LRRM 2020, 2025 (1st Cir., April 9, 1986) (ICC exemption of lease transaction and imposition of employee protections under § 10505 "exempted B&M from the conditions of the RLA with respect to major disputes."); *Missouri Pac. R.R.* v. *UTU*, 782 F.2d 107, 111 (8th Cir. 1986) (affirming district court holding "that MOPAC is exempted under § 11341(a) * * * from the requirements of the Railway Labor Act"); *Burlington Northern, Inc.* v. *American Railway Supervisors Ass'n*, 503 F.2d 58, 62-63 (7th Cir. 1974) (employee protections ordered by ICC pursuant to merger are controlling in case of conflict with RLA procedures); *Bundy* v. *Penn Central Co.*, 455 F.2d 277, 279-80 (6th Cir. 1972) (minor dispute procedures of RLA are overridden by ICC-imposed order under § 5(2)(f) [now § 11347]); *UTU* v.

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[21] In *BLE* v. *CNW* the employee protective conditions imposed by the ICC were agreed to by the carrier and the union before the merger. The statute permits the parties to make such pre-merger agreements and to submit them to the Commission for approval. 49 U.S.C. § 11347. If it approves, the agreement has the force of and becomes a Commission order. *Norfolk and Western Ry.* v. *Nemitz*, 404 U.S. 37 (1971).

Respondents may seek to distinguish *BLE* v. *CNW* by suggesting that the result there reflected a determination by the court that the union having agreed to the protective conditions thereby waived its ability to invoke RLA procedures. But no such analysis appears in the decision and in any event would be incorrect if it led to the conclusion that unions which do not enter into pre-merger agreements *are* free to invoke the RLA. As the Eighth Circuit ruled, the transaction is exempted from the restraints of the RLA to the extent necessary to carry out the transaction (314 F.2d at 432), not on a theory of union waiver but because otherwise unions could stymie Commission-approved transactions.

Norfolk & Western Ry., 332 F. Supp. 1170, 1174 (N.D. Ohio 1971) ("plain language" of Interstate Commerce Act conferred "exclusive and plenary jurisdiction upon the ICC to approve mergers and relieve carriers from all other restraints of federal law, without carving a specific exception with regard to the Railway Labor Act"). And the Sixth Circuit ruled in *Nemitz* v. *Norfolk & Western Ry.*, 436 F.2d 841, 845 (6th Cir.), *aff'd on other grounds*, 404 U.S. 37 (1971), in language echoing the Eighth Circuit's quoted above:

> "The authority vested in the I.C.C. to effectuate proposed mergers would be rendered ineffective if authority to adjust work realignments through fair compensation did not exist. Since, under the Rail-Way Labor Act, employees cannot be compelled to accept or arbitrate new working rules or conditions, the application of the Railway Labor Act to situations such as that presented here, like the Harrington Amendment, would threaten to prevent many consolidations, and, therefore, should not be applied."

See *Kent* v. *CAB*, *supra*, 204 F.2d at 266, which held that a collective bargaining contract under the RLA "must yield to the paramount power of the [Civil Aeronautics] Board to perform its duties under the" Civil Aeronautics Act to approve mergers "upon such terms as it determines to be just and reasonable in the public interest." *Accord*, *IAM* v. *Northeast Airlines*, 400 F. Supp. 372, 373-74 (D. Mass. 1975), *aff'd*, 536 F.2d 975 (1st Cir. 1976) (RLA "is not applicable where the dispute arises out of a merger" because "Congress has provided a special mechanism for resolving the numerous problems attendant on such a merger"); see also cases cited note 8, p. 7, *supra*.[22]

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[22] *Texas & New Orleans R.R.* v. *Brotherhood of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962), conflicts in certain respects with the authorities cited in the text. There the court ruled that the Norris-LaGuardia Act barred it from enjoining a threatened strike

D. Override of the Railway Labor Act Is Required in This Case.

The result reached in the many cases just mentioned has special—and we might add obvious—force in this case. The rights of the MKT and the DRGW to use their own crews were expressly recognized by the Commission to be material terms of each of the trackage rights applications it approved as being in the public interest. (Pet. App. 67a.) If the RLA were to apply to the crew selection process, the transaction approved by the Commission could be postponed while the "almost interminable" major dispute procedures of that Act were exhausted, or indeed frustrated altogether by threat of or resort to strike. Indeed, as we have noted, the MP's employees have already threatened and been enjoined from striking over this very matter.

The possibility that MP crews could resort to self help against the tenants has, if anything, even graver consequences. The very purpose of the grant of trackage rights was to protect and foster a competitive relationship between the tenants and the MP. It is inconceivable in the first instance that the MKT (for example) should have to bargain with and rely on MP employees in seeking to wrest new or protect existing traffic from the MP. And it would be astonishing if, as a result of a transaction approved by the Commission to maintain competition between the MP and the MKT, Congress intended to permit MP employees to interfere with and possibly

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over the carrier's effort to implement an ICC-approved transaction. We believe that the court erred in holding that § 11347 [then § 5(2)(f)] of the Interstate Commerce Act is not part of the pattern of the national labor legislation to which the Norris-LaGuardia Act must be accommodated. See *United States* v. *Lowden*, 308 U.S. 225, 236-38 (1939). In any event, even in that case the court acknowledged that union resorts to the RLA that were "contrary to the public interest" in the context of ICC-approved transactions would be unenforceable. 307 F.2d at 161-62.

shut down the MKT's entire operations. Moreover, if the MP employees demand, upon pain of strike, that MP ban MKT trains with MKT crews, and the MKT's employees demand, upon pain of strike, that MKT not hire MP crews, a stalemate will result. Commerce will be interrupted and the Commission's approval of the trackage rights applications will be nullified. And finally, use of MP crews to operate MKT trains obviously would require the approval of the MP, which would thus be empowered to frustrate the competition that the Commission intended to protect and preserve.

In the case at bar the court of appeals sought to distinguish *BLE* v. *CNW* on the ground that the Eighth Circuit in that case "recognized that immunity attached only to obstacles that would frustrate fruition of the" ICC-approved transaction. (Pet. App. 18a.) But as we have shown above, and as the Commission ruled below, the RLA major dispute procedures, if applicable to the crew selection process, *would* be an obstacle to fruition of the approved trackage rights transactions. Thus the court's distinction is one without a difference. The rationale of that case is fully applicable to this one and the Commission adopted it in concluding that the carriers herein are exempt from the major dispute procedures of the RLA in implementing the approved trackage rights transactions.

III. SECTION 11341(a) IS SELF-EXECUTING

Section 11341(a) provides in pertinent part:

> "A carrier * * * participating in * * * a transaction approved by * * * the Commission under this subchapter may carry out the transaction * * * without the approval of a State authority. A carrier * * * participating in that approved * * * transaction *is exempt* from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction * * *." (Emphasis added.)

As that plain language makes clear, the Commission is not called upon to do anything under § 11341(a). The types of transactions (including trackage rights transactions) that require Commission approval are set out in § 11343, and the criteria according to which the Commission is directed by Congress to grant or deny approval are set forth in § 11344. In particular, § 11344(c) provides that the Commission shall grant approval if "it finds the transaction is consistent with the public interest." Section 11341(a) then provides, without requiring further Commission interposition, that a carrier participant "is exempt from the antitrust laws and from all other law * * * as necessary to let that person carry out" the transaction that the Commission has approved. The Commission itself, in determining under § 11344 whether the public interest warrants approval of a proposed transaction, is not required to determine, or to make any findings, whether it would be "necessary" to override some particular law to effectuate the transaction if approved. See *Schwabacher* v. *United States*, 334 U.S. 182 (1948).[23]

That is the point the Commission was making when, in answer to the contention of the unions that its initial orders approving the trackage rights applications did not expressly state that the carriers were exempt from the RLA, it said (Pet. App. 60a):

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[23] In *Schwabacher*, the Court explained that Commission approval of a proposed railroad merger "is dependent upon three, and upon only three considerations," those then set forth in the predecessor to § 11344. Following Commission approval, the "approved transaction goes into effect without need for invoking any approval under state authority, and the parties are relieved of 'restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved * * *.'" 334 U.S. at 194-195. *BLE* v. *CNW* and other such decisions by the lower courts in cases involving the RLA are consistent with that decision; the decision below is not.

> "The terms of section 11341 immunizing an approved transaction from any other laws are self-executing and there is no need for us expressly to order or to declare that a carrier is specifically relieved from certain restraints."

And that is precisely what the Eighth Circuit ruled in rejecting a similar contention by the union in *BLE* v. *CNW* that the Commission had failed to make an express finding of exemption. The court held that the Commission's approval of a transaction, and its imposition of the required employee protections, "carried with it any exemption from the restraints of other laws as contemplated by § 5(11) [now § 11341(a)] to the extent necessary to carry out the merger." 314 F.2d at 432. See *Brotherhood of Locomotive Engineers* v. *Boston and Maine Corp.*, *supra*, 122 LRRM at 2025 ("We also note that the exemption provision, § 11341(a), is self-executing.").

It is true that the Commission's approval of a transaction immunizes the carrier participants from the RLA only to the extent necessary to implement the transaction. Thus it may be that, subsequent to the Commission's order of approval, a union will argue that the carriers are seeking more immunity from the major dispute procedures of the RLA than is necessary to implement the approved transaction. In such a case the issue for decision will be whether application of the RLA would frustrate or impede an action intended to implement the approved transaction; if so, then the carriers are exempt from the RLA under § 11341(a); if not, the RLA may apply. The issue will not turn on whether the Commission, in its order of approval, made any findings of the need for an exemption under § 11341(a) from some other statute for, as shown above, that section requires no action whatever by the Commission in passing on an application subject to § 11343. Rather, the function of the Commission under § 11344 is to determine whether a

grant of the application is in the public interest and otherwise comports with the standards specified therein.[24]

The court of appeals' misunderstanding of § 11341(a) led it to the erroneous conclusion that the Commission "rejected the notion that it had to provide some basis for concluding that waiver of the Railway Labor Act was necessary" to the transaction it had approved. (Pet. App. 10a.) As we have shown, the Commission correctly construed § 11341(a) as not requiring findings with respect to exemption in the initial order of approval. When the issue of exemption subsequently arose, the Commission adequately explained why the crew selection process necessarily was exempt from the RLA. On both counts the Commission's decision is squarely in keeping with the statute and with *BLE* v. *CNW* and the other decisions cited above.

IV. THE 4-R ACT DID NOT AMEND THE LAW TO ALLOW THE RAILWAY LABOR ACT TO INTERFERE WITH TRANSACTIONS APPROVED BY THE COMMISSION

In the court below the respondents urged that the result in *BLE* v. *CNW* was overturned by the Railroad Revitalization and Regulatory Reform Act of 1976 (the "4-R Act"). Section 402(a) of that Act (90 Stat. 62) added a sentence to § 11347 (then § 5(2)(f)) requiring that henceforth the employee protective conditions to be imposed by the Commission shall be "no less protective * * * than those heretofore imposed pursuant to this subdivision and those *established pursuant to section 405 of the Rail Passenger Service Act* (45 U.S.C. 565)." (Em-

[24] This is not to say that an opponent of an application could not contend in the initial agency proceeding that the grant of the application would be contrary to the public interest in a particular case if the result would be to override rights under another statute such as the RLA. The Commission might well have a duty to consider such a contention, although no such contention was made in the initial agency proceeding below regarding the terms of the trackage right applications relative to crew selection.

phasis added.) The latter act created Amtrak and permitted railroads providing intercity passenger service to transfer that service to Amtrak by contract. Section 405 required such contracts to contain employee protective conditions certified as "fair and equitable" by the Secretary of Labor, and it directed the inclusion of such protective conditions as may be

> "necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) to such employees under existing collective-bargaining agreements or otherwise; (2) the continuation of collective-bargaining rights; (3) the protection of such individual employees against a worsening of their positions with respect to their employment; [etc.]."

On April 17, 1971, the Secretary approved and certified certain conditions which came to be known as the "Appendix C-1" conditions, so called because they were an appendix to the standard contract between Amtrak and the contracting railroads.[25] In keeping with § 405's direction, Article I, § 2 of those conditions included the following:

> "The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits * * * of railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes." [26]

Since that is one of the conditions "established pursuant to Section 405 of the" Amtrak Act, the Commission after

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[25] In *Congress of Railway Unions* v. *Hodgson*, 326 F. Supp. 68, 76 (D.D.C. 1971) the court upheld the Appendix C-1 conditions against a challenge from labor that they were insufficiently protective of employees.

[26] The Amtrak Appendix C-1 conditions are reproduced as an appendix to *Oregon Short Line R. Co.—Abandonment—Goshen*, 354 I.C.C. 76, 90-96 (1977).

passage of the 4-R Act has included it (with minor changes) in those imposed under § 11347 of the Interstate Commerce Act. See, *e.g.*, Article I, § 2 of the *New York Dock* conditions, 360 I.C.C. at 84; see generally *New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979). Respondents asserted below that that condition imported the RLA into the implementation of transactions approved under Chapter 113.

We have shown above that the RLA, if it applied, would gravely threaten the success of the long-standing congressional goal of encouraging rail mergers and consolidations. A similar threat, in the form of the Harrington amendment forbidding changes in existing employment rights as a result of a merger, was turned back by Congress in 1940. Page 17, *supra*. It stands to reason that if by passage of the 4-R Act Congress meant to thrust the major dispute procedures of the RLA in the way of carrier efforts to implement ICC-approved mergers, and permit unions to delay and indeed strike over such efforts, some notice would have been taken. Yet the legislative history of the 4-R Act on this point is silent. See *New York Dock Ry.* v. *United States*, *supra*, 609 F.2d at 93.[27] "This silence is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely." *Edmonds* v. *Compagnie Generale Transatl.*, 443 U.S. 256, 266-67 (1979); see *Watt* v. *Alaska*, 451 U.S. 259, 270-271 (1981).

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[27] The provision which became § 402(a) of the 4-R Act first appeared in H.R. 10979, the House version of the Act, in identical form in all relevant respects to its final enactment. The House Report of the Committee on Interstate and Foreign Commerce accompanying the bill paraphrases but otherwise does not discuss the amendment. The Senate bill, S. 2718, contained no provision comparable to what became § 402(a). The Conference Report does not mention why the House-proposed amendment to § 5(2)(f) was agreed upon.

Floor debate concerning the meaning of employee protection provision in the 4-R Act was similarly limited. Only one Congressman, Representative Skubitz, commented on the extent of such protection and that comment came in the context of a provision mandating

The Commission's construction of the statute as preserving existing collective bargaining rights only to the extent that they do not conflict with the implementation of an approved transaction (Pet. App. 59a-60a), furthers rather than frustrates the goals of the Act and accordingly warrants respect here. *Hayfield Northern R.R.* v. *Chicago and North Western Transp. Co.*, 467 U.S. 622, 634 (1984) ("The Commission's position, of course, is entitled to considerable deference since it represents the construction of a regulatory statute by the agency charged with the statute's enforcement.").

The history of the Amtrak Act § 405 conditions further supports the Commission's construction. Section 405 was copied almost verbatim—and almost without discussion—from § 13(c) of the Urban Mass Transportation Act of 1964, 49 U.S.C. app. § 1609(c).[28] That Act provided federal aid to state and local governments for the provision of mass transportation facilities and equipment. The purpose of § 13(c) was to preserve the collective bargaining rights of affected employes when federal funds were utilized to purchase a private transit company, since many state and local governments denied such rights to

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employee protection arrangements in abandonments. That section, Congressman Skubitz stated, only provided "a restatement of what the Commission already does * * *." 121 Cong. Rec. 41340 (1975).

[28] Representatives of labor said that "[t]he protective provisions in this section are drawn literally from the comparable provisions of the Urban Mass Transportation Act of 1964 * * * and are designed to serve the identical policy expressed in these laws." *Supplemental Hearings on H.R. 17849 and S. 3706 before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. 122 (1970) (Statement of Al H. Chesser, National Legislative Director, United Transportation Union, also representing the Congress of Railway Unions). Secretary of Labor Shultz noted: "I assume that the coverage under the protective arrangement provision * * * is substantially of the same scope as the protective arrangements provision * * * of the Urban Mass Transportation Act." *Id.* at 65 (letter from George P. Shultz).

their employees. See *Jackson Transit Authority* v. *Local Division 1285, Amalgamated Transit Union*, 457 U.S. 15, 17 (1982); *Division 1287, Amalgamated Transit Union* v. *Kansas City Area Transp. Authority*, 582 F.2d 444 (8th Cir. 1978).

It was not the intention of the Amtrak conditions, however, to allow collective bargaining rights and agreements to prevent implementation of an approved transaction. Rather, Article I, § 4, of Appendix C-1 (reproduced at 354 I.C.C. 90-91) provided for the negotiation of implementing agreements with respect to a transaction "which will result in a dismissal or displacement of employees or rearrangement of forces" (354 I.C.C. at 91) and, in default of such an agreement, for binding arbitration. Except for allowing greater expedition, which was justified by, among other things, "the time element written into the [Amtrak] statute," that provision in Appendix C-1 was patterned after Sections 4 and 5 of the Washington Job Protection Agreement as incorporated by the I.C.C. in prior employee protection conditions. *Congress of Railway Unions* v. *Hodgson, supra*, 326 F. Supp. at 75-76.[29] Sections 4 and 5 provided a means whereby prohibitions in collective agreements that would impede implementation of a transaction, such as a "prohibition against transferring work from one railroad to another," could be overcome without resort to the procedures of the Railway Labor Act. *Southern Ry. Co.—Control—Central of Georgia Ry. Co.*, 331 I.C.C. 151, 165 (1967). "[W]ithout something comparable to it, section 6 of the Railway Labor Act * * * would seriously impede mergers." *Id.* at 171. Thus, for example, an arbitration award under Art. I, § 4, of Appendix C-1 provided for

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[29] The Act required Amtrak to commence passenger service within six months of its enactment. See 326 F. Supp. at 76. In the *Hodgson* case, the unions contended (unsuccessfully) that Sections 4 and 5 of the Washington Agreement should have been "incorporate[d] verbatim" into Appendix C-1, rather than that a provision for such implementing agreements and arbitration was inappropriate altogether. 326 F. Supp. at 75.

the use of Milwaukee engineers—rather than Burlington Northern engineers—in operating Amtrak trains over some 11 miles of BN track so as to eliminate an otherwise unnecessary stop to change crews east of Minneapolis. See *Engineers* v. *Burlington Northern, Inc.*, 92 LRRM 3436 (D. Minn. 1976).

As we have noted, the conditions imposed under § 11347 include a similar provision for implementing agreements and for arbitration in default of an agreement.[30] Indeed, in connection with the *New York Dock* transaction itself, an arbitration award arising out of that provision provided for consolidation of the employees and seniority rosters of the merged railroads as New York Dock employees subject to a common seniority roster under New York Dock's collective agreements, thus displacing the seniority roster and collective agreements of the carrier acquired by New York Dock insofar as its employees were concerned. See *Locomotive Engineers* v. *New York Dock Rail Road*, 94 Labor Cases ¶ 13,704 (E.D.N.Y. 1981), *subsequent opinion*, 97 Labor Cases ¶ 10,007 (E.D.N.Y. 1982).[31]

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[30] Article I, § 4, of *New York Dock* (see 360 I.C.C. at 85) more closely followed Sections 4 and 5 of the Washington Agreement as incorporated in prior ICC protective conditions in that it did not include the greater expedition authorized by the cognate provision in Appendix C-1, while Article I, § 4, of the *Norfolk and Western* and *Mendocino Coast* conditions (see 354 I.C.C. at 610-611) did provide for such expedition. The unions supported the New York Dock conditions in *New York Dock Ry.* v. *United States, supra*, 609 F.2d 83, and objected (unsuccessfully) to the expediting aspects of the latter conditions in *Railway Labor Exec. Ass'n* v. *United States, supra*, 675 F.2d at 1248, but did not object then—as they did not object in regard to Appendix C-1—to provision for implementing agreements and arbitrations under which work and forces could be rearranged in a manner inconsistent with provisions in collective bargaining agreements. That tactic of so objecting was not adopted until after the terms of the employee protective conditions had been fixed.

[31] Such consolidation of seniority rights—which necessarily involves departures from collective agreement provisions—is among

In sum, virtually without discussion a provision conditioning federal grants on the willingness of local government to permit their mass transit employees to engage in collective bargaining has made its way into the employee protections provided under the Interstate Commerce Act. However, both the provenance of that provision and its application demonstrate that the Commission correctly concluded that the 4-R Act was not intended to amend existing law in a manner that would allow the RLA to interfere with transactions approved under Chapter 113 of the Interstate Commerce Act.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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the more common functions of implementing agreements and arbitration under ICC protective conditions. See, *e.g.*, *Anderson* v. *Norfolk & Western Ry. Co.*, 773 F.2d 880 (7th Cir. 1985); *Employees Protective Ass'n* v. *Norfolk & Western Ry.*, 511 F.2d 1040, 1043 (4th Cir. 1975).

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Nos. 85-792 and 85-793

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

INTERSTATE COMMERCE COMMISSION,
Petitioner,
v.
BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *et al.*,
Respondents.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
Petitioner,
v.
BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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SUPPLEMENTAL BRIEF FOR RESPONDENT UNITED TRANSPORTATION UNION

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On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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SUPPLEMENTAL BRIEF FOR RESPONDENT UNITED TRANSPORTATION UNION

On December 1, 1986, this Court issued an order inviting the parties to submit supplemental briefs on the following question:

In view of 28 U.S.C. Section 2344, 49 U.S.C. Section 10327(i), and the passage of more than 60 days between (1) respondents' appeals from the Interstate Commerce Commission's October 25, 1983, order, declining to reconsider its May 18, 1983, order regarding respondent Brotherhood of Locomotive Engineers' motion for clarification, and (2) service of the Commission's May 18, 1983, clarification order, did the appeals properly bring before the reviewing court the May 18, 1983, order?

This supplemental brief is respectfully submitted by respondent United Transportation Union [hereinafter, "UTU"] in support of its position that the court of appeals had jurisdiction to review both the May 18 and the October 25, 1983 orders.

SUPPLEMENTAL STATEMENT OF FACTS

Within twenty (20) days after the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] served its decision on May 18, 1983, denying the petition of the Brotherhood of Locomotive Engineers to clarify the 1982 merger order, respondents UTU and Brotherhood of Locomotive Engineers [hereinafter, "BLE"] filed petitions with the ICC to reconsider that decision.[1] Those petitions were filed under 49 U.S.C. § 10327(g)(1) and were timely under the Commission's rules pertaining to "discretionary appeals." *See* 49 C.F.R. § 1115.3(e) (1983).[2] On October 25, 1983, the

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[1] Respondent BLE's Petition was filed on May 31, 1983, and the UTU's petition was filed on June 7, 1983.

[2] In November 1982, the ICC redesignated and revised its Rules of Practice to use the current designations. Prior to that revision, Rule 98 of the Commission's Rules of Practice, which was first added in 1977 by *Ex Parte No. 55 (Sub-No. 24)*, served May 2, 1977, and Rule 99 implemented Section 303(a) of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, 48, to provide for petitions for discretionary review of ICC decisions; such petitions were to be filed within 20

ICC served its decision in this proceeding, denying the BLE's and UTU's separate petitions for reconsideration. Respondent BLE thereafter filed a petition with the United States Court of Appeals for the District of Columbia Circuit on December 16, 1983, to review both the May 18 and October 25, 1983 decisions. Respondent UTU filed a separate petition with that court of appeals on December 23, 1983, to review the October 25, 1983 decision under 28 U.S.C. §§ 2321(a) and 2341, *et seq.*; respondent UTU did not petition to review the May 18, 1983 decision because, unlike the BLE, it had not participated in the initial petition to clarify which was denied by the May 18th order.

ARGUMENT

I. This Court Has Jurisdiction To Review The Merits Of The May 1983 Decision Since The Timely Petitions For Reconsideration Tolled The Time In Which Respondents Were Required By 28 U.S.C. § 2344 To Invoke The Jurisdiction Of The Courts Of Appeals.

Respondent UTU has reviewed the Supplemental Brief for respondent BLE on this question, and since respondent UTU agrees with the BLE's argument, respondent UTU hereby adopts those arguments. This brief is respectfully submitted by respondent UTU to set forth both the legislative history of what is now 49 U.S.C. § 10327 (i) and additional reasons why respondent UTU asserts that the petitions for reconsideration tolled the time in which the petitions for review were to be filed.

28 U.S.C. § 2344 provides in pertinent part that: "Any party aggrieved by the final order [reviewable under this chapter] may, within 60 days after its entry,

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days after service of the ICC devision for which review was being sought, with a possible extension of 20 days. *See*, Rule 98(c), ICC Rules of Practice (1977). The 30 day period for such discretionary reviews has been continued by each successive ICC revision of its rules. *See, Ex Parte No. 55 (Sub-No. 24A)*, served June 29, 1979 (Rule 98(e)); 49 C.F.R. § 1115.3(e) (1985).

file a petition to review the order in the court of appeals wherein venue lies." That provision, the courts of appeals have consistently noted, is jurisdictional and may not be enlarged by a court of appeals. *E.g., Microwave Communications, Inc. v. FCC*, 515 F.2d 385, 389 (D.C. Cir. 1974); Rule 26(b), Fed. R. App. P. (". . . court [may not] enlarge the time prescribed by law for filing a petition to set . . . aside . . . an order of an administrative agency . . ., except as specifically authorized by law"). However, notwithstanding a literal reading of Section 2344 and similar jurisdictional provisions, it is well accepted that a timely request for discretionary agency review tolls the time in which a party may seek court review of the agency order until the agency issues its ruling on the request for reconsideration. *E.g., Arch Mineral Corp. v. Director, Office of Workers' Compensation Programs*, 798 F.2d 215, 218-19 (7th Cir. 1986); *Outland v. CAB*, 284 F.2d 224, 226-28 (1960).

This construction of jurisdictional provisions for review of agency orders is analogous to similar interpretations of the time in which appeals may be taken from orders of lower federal courts to appellate courts when requests for reconsideration have been filed. *Accord, Pfister v. Northern Illinois Finance Corp.*, 317 U.S. 144 (1942); *see also*, Rule 4(a)(4), Fed. R. App. P. (clarifying effect of premature notice of appeal). Moreover, the *Outland* view of the tolling effect of a timely petition for discretionary agency review was the accepted state of the law when Congress, by Pub. L. No. 93-584, 88 Stat. 1917 (1975), made ICC orders subject to review under the existing Hobbs Administrative Review Act, 28 U.S.C. § 2341, *et seq. See, Outland v. CAB, supra*, 284 F.2d at 227 (non-Hobbs Act case).

In this case, however, a question has been raised as to the application of the *Outland* tolling principle, because 49 U.S.C. § 10327(i) specifically provides for rail cases before the ICC that:

> Notwithstanding this subtitle [*i.e.*, Interstate Commerce Act], an action of the Commission under this section and an action of a designated division under subsection (c) of this section [voiding requirement of initial decision] is final on the date on which it is served, and a civil action to enforce, enjoin, suspend, or set aside the action may be filed after that date.

Respondent UTU respectfully submits that Section 10327 (i) was not intended to, and does not, change the fact that a timely petition for discretionary agency reconsideration tolls the time that an aggrieved party may invoke the jurisdiction of court of appeals under 28 U.S.C. § 2344. *E.g.*, *Cartersville Elevator, Inc. v. ICC*, 724 F.2d 668, 672, *en banc*, 735 F.2d 1059, 1061 (8th Cir. 1984).

Section 10327(i)'s predecessor[3] was added to the Interstate Commerce Act [hereinafter, "ICA"] in 1976 when Congress amended Section 17(9) of ICA by Section 303(a) of the Railroad Revitalization and Regulatory Reform Act of 1976 [hereinafter, "4R Act"], Pub. L. No. 94-210, 90 Stat. 31, 48-50. Section 303(a) of the 4R Act was devised primarily from the House version of the bill, but included two provisions from the Senate version, one of which was to allow the Commission to hear a matter initially rather than having that matter proceed through the normal appellate process, and the other was to require all ICC proceedings to be concluded with administrative finality within 3 years after such proceeding began. Conference Report on S.2718, H. Rpt. No. 94-781, 94th Cong., 2d Sess. at 159-62 (1976). Section 10327(i)'s predecessor was not included in the House version of the bill (*see*, 121 Cong. Rec. 41404, 41407 (December 17, 1975)), but was a part of the Senate

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[3] In 1978, Congress recodified the Interstate Commerce Act as 49 U.S.C. § 10101, *et seq.* Pub. L. No. 95-473, 92 Stat. 1337 (1978). That recodification was intended to be without substantive change. Pub. L. No. 95-473 at § 3, 92 Stat. at 1466. Former Section 17(9) of the Act, as added in 1976, became 49 U.S.C. § 10327(i).

version. *See*, S. Rpt. No. 94-499, 94th Cong., 1st Sess. at 60-61 (1975). While the Conference Report and debates are silent on why Section 10327(i)'s predecessor was included in the final bill, the reason for its inclusion may be seen from an examination of Section 303(a)'s stated intent.

Both the House[4] and Senate reports show that Section 303(a) had two purposes. First, the bill was intended to revise the ICC's procedures under which the ICC handled rail cases to reduce unnecessary "regulatory lag." H. Rpt. No. 94-725, *supra* note 4 at 61. As the House Report noted, many of the Commission's rail procedures:

> [W]ere developed in a historical time period quite different from today. Moreover, with most Federal agencies following up-to-date rules of practice the Commission should be given the opportunity to benefit from their experience and establish comprehensive but effective rules of practice suitable for 1975 and the future.

H. Rpt. No. 94-725, *supra* note 4 at 60. The Senate's version of the bill was guided by similar considerations, for after noting that the ICC's rail procedures, with one exception, dated from 1940, the Senate Report stated:

> Since 1940, administrative proceedings have grown increasingly complex. In 1947, the Administrative Procedure Act was enacted and now controls the procedures of most government agencies. However, section 17 [of the ICA] continues to govern ICC procedures, and since its requirements are in several respects considerably more extensive than those contained in the APA, section 17 in its present form has contributed substantially to unnecessary regulatory lag.

S. Rpt. No. 94-499, *supra* at 60. Both bills sought to correct these deficiencies by streamlining the ICC's internal review procedures and by establishing deadlines

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[4] H. Rpt. No. 94-725, 94th Cong., 1st Sess. (1975).

by which the agency had to complete its proceedings. *E.g.*, H. Rpt. No. 94-725 at 61; S. Rpt. No. 94-499 at 61-62.

A second problem which both versions of the bill addressed was the inability of the Commission under pre-1976 law to make its non-money orders effective immediately. S. Rpt. No. 94-499 at 60. Both versions of the bills corrected this problem by allowing the Commission to make an order effective on less than 30 days notice. *See*, H. Rpt. No. 94-725 at 163.

Section 10327(i)'s predecessor, respondent UTU respectfully submits, is part of, and, indeed, a necessary feature of Congress' response to both problems. Prior to 1976, Section 17(9) of the ICA provided that when an application for reconsideration of any decision, order or requirement of a division, an individual Commissioner, or a board had been made and had been decided, a suit to enjoin or set aside the agency action "may" be brought at that time, "but not otherwise." 49 U.S.C. § 17(9) (1974). That requirement had been construed by the courts as requiring a party to utilize such internal review procedures *before* seeking judicial review of the ICC's order. *Holmes v. United States*, 89 F.Supp. 894, 896 (S.D.N.Y. 1949) (3 Judge Court), *aff'd per curiam*, 339 U.S. 927 (1950); *see also*, *Teamsters Joint Council 40 v. United States*, 238 F.Supp. 301 (W.D. Pa. 1965) (3 Judge Court). Such a rigid "exhaustion of administrative remedies" requirement was inconsistent with Section 10(c) of the Administrative Procedure Act, 5 U.S.C. § 704 (1986), which provides in pertinent part that:

> Except as otherwise expressly required by statute, agency action otherwise final is final for purposes of this section whether or not there has been presented or determined an application for . . . any form of reconsideration . . . .

Since Section 303(a) of the 4R Act was intended to streamline the ICC's internal procedures and to allow it

to make its orders effective on short notice, even though its decision was pending further agency reconsideration, it was necessary to give parties aggrieved by the ICC's order an option to seek immediate judicial review without being subjected to a defense of failing to exhaust administrative remedies. Section 10327(i) accomplishes that objective. However, Congress chose to give aggrieved parties a second option, and that was to seek discretionary review by the ICC itself. Since Section 303(a) of the 4R Act, especially as construed by the ICC in its regulations (*see* note 2, *supra*), gave aggrieved parties the option of seeking discretionary agency review of a decision which affects them (*see* 49 U.S.C. § 10327(g)(1)), the necessary conclusion which follows is that Congress did not intend to preclude subsequent judicial review when it provided for discretionary agency review. Surely, a discretionary review procedure which cuts off judicial review would be a meaningless remedy, rarely, if ever, used.

Viewing Section 10327(i) and Section 2344 as precluding judicial review of the underlying agency action after denial of a timely petition for the discretionary agency review, respondent UTU submits, would run counter to the consistent line of cases interpreting similar jurisdictional provisions, including the Administrative Procedure Act on which Congress asserted it was modeling its revisions to the ICC's procedures. *E.g., Outland v. CAB*, *supra*, 284 F.2d at 227 (construing Section 10(c) of the APA, now 5 U.S.C. § 704). On the other hand, viewing a timely request for discretionary agency reconsideration as tolling the time period in which to seek judicial review, will foster the Administrative Procedure Act's and modern jurisdictional provisions' policy of allowing an agency to reconsider and to reflect upon its decision before the federal courts are involved. *Compare, Cartersville Elevator, Inc. v. ICC, supra, and B.J. McAdams, Inc. v. ICC*, 551 F.2d 1112, 1114-15 (8th Cir. 1977), *with, Provisioners Frozen Express, Inc. v. ICC*, 536 F.2d 1303 (9th Cir.

1976) (untimely petition does not toll time to seek judicial review). Moreover, such a view of the effect of a timely request for discretionary review is consistent with the federal courts' longstanding view that a timely motion to reconsider tolls the time for taking an appeal. *E.g.*, *Pfister v. Northern Illinois Finance Corp.*, *supra*, 317 U.S. at 149-50. Surely, if Congress had intended in 1976 to change this longstanding view of the effect of seeking reconsideration in a timely fashion, it would have done so by language and with legislative history which clearly evidenced such an intent. Section 303(a) of the 4R Act does not even hint at such an intent.

CONCLUSION

Respondent UTU respectfully submits that the court of appeals had jurisdiction to review the merits of the May 1983 ICC order at issue in these cases.

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Nos. 85-792 and 85-793

In the Supreme Court of the United States

October Term, 1985

INTERSTATE COMMERCE COMMISSION,
Petitioner,

vs.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *et al.*,
Respondents.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
Petitioner,

vs.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENT BROTHERHOOD OF LOCOMOTIVE ENGINEERS

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENT BROTHERHOOD OF LOCOMOTIVE ENGINEERS

This brief is submitted by respondent Brotherhood of Locomotive Engineers ("BLE") in response to the following question posed by the Court in its Order dated December 1, 1986:

> "In view of 28 U.S.C. Section 2344, 49 U.S.C. Section 10327(i), and the passage of more than 60 days between (1) respondents' appeals from the In-

terstate Commerce Commission's October 25, 1983, order, declining to reconsider its May 18, 1983, order regarding respondent Brotherhood of Locomotive Engineers' motion for clarification, and (2) service of the Commission's May 18, 1983, clarification order, did the appeals properly bring before the reviewing court the May 18, 1983, order?

On April 4, 1983, BLE filed a petition with the ICC for clarification of the Commission's consolidation order with respect to employee protective conditions. The ICC denied this petition in a decision bearing service date of May 18, 1983. On May 31, 1983, BLE filed a petition for reconsideration which was denied in a decision served on October 25, 1983. On December 16, 1983, BLE filed a petition to review the decisions on its petition for clarification and its petition for reconsideration.

BLE submits that the appeals did properly bring before the court of appeals the May 18, 1983 order denying BLE's petition for clarification. In view of BLE's timely filing of a petition for reconsideration, the sixty-day period for review provided in 28 U.S.C. §2344 (the Hobbs Act) did not commence running until the Commission ruled upon the petitions for reconsideration. Moreover, regardless of tolling considerations, the ruling on the merits raised by the petition for reconsideration brought the May 18, 1983 order within the scope of review of the court below.

1. The above view is consistent with the decisions of this Court. The Court in *Civil Aeronautics Board v. Delta Air Lines*, 367 U.S. 316, 326 (1961), embraced "the general notion that an administrative order is not 'final,' *for the purposes of judicial review*, until outstanding petitions for reconsideration have been disposed of." (Emphasis in original). Later, the Court, quoting with approval from

Outland v. Civil Aeronautics Board, 284 F.2d 224, 227 (D.C. Cir. 1960), said: "Unless Congress provides otherwise, '[w]here a motion for rehearing is in fact filed there is no final action until the rehearing is denied.'" *See American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 541 (1970). Furthermore, as the dissenting opinion below by Judge MacKinnon noted, if the ruling upon BLE's petition for reconsideration is considered a ruling on the merits, the "decision on the merits of the motion for reconsideration could extend the time period for seeking appellate review." 761 F.2d 714, at 728. This observation was based upon this Court's decision in *Bowman v. Loperena*, 311 U.S. 262 (1940), which involved the timeliness of an appeal from an order adjudicating the debtor bankrupt. This Court held:

> The filing of an untimely petition for rehearing which is not entertained on its merits, or a motion for leave to file such a petition out of time, if not acted upon or if denied by the trial court, cannot operate to extend the time of an appeal. But where the court allows the filing and, after considering the merits, denied the petition, the judgment of the court as originally entered does not become final until such denial, and the time for appeal runs from the date thereof. (*Id.* at 266). (Footnotes omitted).

In sum, two propositions appear to evolve from these rulings. First, the litigant is left the choice whether to exhaust administrative remedies or to immediately seek judicial review; and considerations of judicial economy dictate that when a petition for reconsideration is filed, review may properly be deferred because the order may be modified in a way making judicial review unnecessary. Second, where an untimely petition for reconsideration of agency

action is considered and denied on the merits, the time period for judicial review of the original order begins to run from the denial of reconsideration.

2. That the appeals properly brought the May 18, 1983 order before the reviewing court is sustained by the legislative history of the involved statutory provisions and the case law applicable thereto.

a. ICC orders first became reviewable under the Hobbs Act in 1975. Pub. L. 93-584, January 2, 1975, 88 Stat. 1917. According to Congress, one of the advantages in bringing ICC orders under 28 U.S.C. §2344 was that "litigants and judges would have the benefit of an established procedure with a sizeable body of interpretative case law that has served efficiently and with general approval for nearly 20 years." 1974 U.S. Code Cong. and Adm. News, pp. 7034, 7037.

The case law developed under 28 U.S.C. §2344 prior to 1975 and therefore applicable to judicial review of ICC orders provided that the sixty-day period for review did not begin to run until the agency had acted upon petitions for reconsideration. Among the cases Congress intended to apply to judicial review of ICC orders were *American Civil Liberties Union v. Federal Communication Commission*, 486 F.2d 411 (D.C. Cir. 1973), and *Montship Lines Ltd. v. Federal Maritime Board*, 295 F.2d 147 (D.C. Cir. 1961). In both cases, the petitioners sought judicial review more than sixty days from issuance of the initial orders but within sixty days from denial of petitions for reconsideration. In the *Montship Lines* case, the court relied upon *Outland v. Civil Aeronautics Board*, 284 F.2d 224 (D.C. Cir. 1960), in finding the petition to review the initial order had been timely filed. The latter case involved a petition to review an order of the CAB under 49 U.S.C. §1486(a), which provided a sixty-day period

of review analogous to that in the Hobbs Act. In holding that the petitions to review properly brought before the court the order complained of, Chief Justice Burger, speaking for the Court of Appeals, stated that a contrary conclusion would encourage " 'protective' petitions for judicial review" and a "whole train of unnecessary consequences," and, therefore, concluded that "when a motion for rehearing is made, the time for filing a petition for review does not begin to run until the motion for rehearing is acted upon by the Board." *Id.* at 228.

b. Shortly after placing the method of review of ICC decisions under the Hobbs Act, the Congress enacted the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act"). Pub. L. 94-210, Feb. 5, 1976, 90 Stat. 31. The purpose of the 4-R Act was to promote the revitalization of the railroad industry through an overhaul of the regulatory system by procedural reforms that would expedite Commission proceedings. Section 203(a) of the Act also revised section 17(9) of the Interstate Commerce Act by inserting a subsection (h), which has since been slightly altered and recodified as 49 U.S.C. §10327(i) and reads:

> Notwithstanding this subtitle, an action of the Commission under this section and an action of a designated division under subsection (c) of this section is final on the date on which it is served, and a civil action to enforce, enjoin, suspend, or set aside the action *may* be filed after that date. (Emphasis supplied).

The analogous provision to section 10327(i) is contained in 5 U.S.C. §704 [formerly 5 U.S.C. §1009(c)] of the Administrative Procedures Act. In *Outland v. Civil Aeronautics Board*, 284 F.2d 224, at 227 (D.C. Cir. 1960),

the court established that 5 U.S.C. §1009(c) was adopted to achieve harmony with this Court's holding in *Levers v. Anderson*, 326 U.S. 219 (1945), that a motion for rehearing was not necessary to exhaust administrative remedies. However, distinguishing between the question of exhaustion and the question of the need to file a petition for review within sixty days regardless of the availability of discretionary appeals, that court said that "[w]here a motion for rehearing is in fact filed there is no final action until the rehearing is denied." 284 F.2d *supra*, 227.

Shortly thereafter, in *Samuel B. Franklin & Co. v. Securities and Exchange Commission*, 290 F.2d 719, at 725 (9th Cir. 1961), *cert. denied*, 368 U.S. 889 (1961),[1] the Ninth Circuit found that the "legislative history of 5 U.S.C.A. §1009(a) convinces us that the section was intended to mean only that it was not necessary to file a petition for rehearing in order to be eligible to obtain judicial review." Although noting that "an agency's order is 'final' in that it is a proper basis for court review without more" (*id.*, 723), the court held "the timely filing of a petition for agency reconsideration does toll the sixty-day period for appeal to this court and that an appeal taken within sixty days from the termination of the petition for reconsideration by the agency is timely." *Id.*, at 725.

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1. In this case, the Ninth Circuit overturned its prior holding in *Consolidated Flower Shipments, Inc. v. Civil Aeronautics Board*, 265 F.2d 449 (9th Cir. 1953), that former 5 U.S.C. §1009(c) required review petitions to be filed within sixty days of an agency decision notwithstanding further rulings on reconsideration. Even though the legislative history showed that Congress merely intended to embody prior case law, which held that a motion to reconsider extended the time to appeal, the court declined to consider that history on the basis that the statutory language was unambiguous.

The rationale of these cases was followed in *Commonwealth of Pennsylvania v. ICC*, 590 F.2d 1187 (D.C. Cir. 1978), which arose from the requirement placed upon the ICC in then 49 U.S.C. §15(8)(a) by section 202(e)(2) of the 4-R Act to render a final decision within seven months after the filing by a railroad of a tariff charge. Two days prior to the expiration of the statutory period, an order approved the tariff requested by the carrier. The Commonwealth petitioned for reconsideration within the thirty-day period specified in the ICC's rules of procedures, but the ICC denied the petition on the ground that it lacked jurisdiction due to the expiration of the seven-month period.

On appeal, "[t]he ICC acknowledged that usually a party has sixty days from the denial of a Petition for Reconsideration to file for judicial review," but contended that the new seven-month requirement superseded the usual review procedures. *Id.*, 1192. Rejecting this argument, Judge MacKinnon, speaking for the court, pointed out that while the 4-R Act intended to speed up the often dilatory deliberations of the ICC by imposing a seven-month deadline, the legislative history did not make any reference to any need to expedite the process of judicial review. *Id.* at 1194, n.23. Judge MacKinnon also said that there was no indication "that Congress considered it advisable to force the expedition of judicial review of Commission orders by * * * not allowing the pendency of such a petition [for reconsideration] to toll the running of the Hobbs Act." *Id.*, 1194. Therefore, the court held that since "the Hobbs Act period was tolled during the pendency of a petition for reconsideration, * * * petitioner will have sixty days to file for judicial review after the disposition of this motion for reconsideration." *Id.* at 1196, n.32.

c. Judicial determinations following 1975 confirm that the sixty-day period for review of ICC orders does not begin to run until the ICC acts upon petitions for reconsideration. For example, in *B.J. McAdams, Inc. v. ICC*, 531 F.2d 1112 (8th Cir. 1977), the ICC's review board denied an application by McAdams to transport candy. McAdams filed a petition for reconsideration that the ICC denied as an appellate division, which rendered its decision administratively final. Instead of seeking judicial review, McAdams filed a discretionary appeal for a declaration that the issue involved a matter of general transportation importance, *i.e.*, a "GTI petition." After denial of that petition, McAdams filed a petition for review.

The Eighth Circuit held that "[e]ven though the filing of a GTI petition is discretionary and not required to exhaust administrative remedies, definite policy reasons reflect that judicial review should be postponed until a pending GTI petition has been ruled upon." *Id.*, 1114-15. (Citations omitted). The court pointed out that otherwise the court and the agency would possess simultaneous jurisdiction and that its decision, therefore, furthered "the interest of judicial economy and agency responsibility."

The Eighth Circuit followed *McAdams* in *Cartersville Elevator, Inc. v. ICC*, 724 F.2d 668 (8th Cir. 1984). In *C.O.D.E., Inc. v. ICC*, 768 F.2d 1210 (10th Cir. 1985), the Tenth Circuit relied upon *McAdams* in holding the statutorily prescribed review period is tolled until the ICC issues its final decision on the petition for reconsideration. *See also Aeromar C. Por. A. v. Department of Transportation*, 767 F.2d 1491, 1493 (11th Cir. 1985), which held a petition to review was prematurely filed where the petition for reconsideration was pending because

"[a]fter the filing of a petition for reconsideration of a FAA order, there is no 'definitive statement on the subject matter' of the order until the petition is denied"; and *Cities of Newark, New Castle and Sanford, Delaware v. Federal Energy Regulatory Commission*, 763 F.2d 533 (3d Cir. 1985).

3. The ICC's ruling on the merits of BLE's petition for reconsideration also brought the May 18, 1983 order within the court's scope of review. In conformity with the principles established by this Court in *Bowman v. Loperena*, 311 U.S. 262 (1940), the various courts of appeals have permitted review of agency orders otherwise time barred when the agency subsequently ruled on the merits of a petition for reconsideration for which a timely review had been filed. *See, e.g., Tallman v. Udall*, 324 F.2d 411 (D.C. Cir. 1963), *reversed on other grounds*, 380 U.S. 1 (1964), *reh. denied*, 380 U.S. 989 (1964); *National Insulation Transportation Committee v. ICC*, 683 F.2d 533, at 543 n.17 (D.C. Cir. 1982) (finding petition to review timely where the agency reopened its decision and considered issues closely interrelated with its prior decision); *Lloyd v. Department of Labor*, 637 F.2d 1270, 1274-75 (9th Cir. 1980) (held petition to review initial order timely because the agency "addressed the substantive arguments" of a petition for reconsideration for which a timely petition for review had been filed).

Accordingly, in light of the Commission's rulings on the merits in entering its decision upon the petitions for reconsideration, BLE's petition to review is timely as to both the May 18, 1983 and October 25, 1983 orders.

CONCLUSION

Based upon the above reasons and authorities, respondent Brotherhood of Locomotive Engineers submits that the appeals properly brought the May 18, 1983 order before the reviewing court.

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL.

No. 85-793

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, PETITIONER

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA

On December 1, 1986, this Court invited the parties to file supplemental briefs limited to the following question:

> In view of 28 U.S.C. § 2344, 49 U.S.C. § 10327(i), and the passage of more than 60 days between (1) respondents' appeals from the Interstate Commerce Commission's October 25, 1983, order, declining to reconsider its May 18, 1983, order regarding respondent Brotherhood of Locomotive Engineers' motion for clarification, and (2) service of the Commission's May 18, 1983, clarification order, did the appeals properly bring before the reviewing court the May 18, 1983, order?

1. The Administrative Orders Review Act, 28 U.S.C. (& Supp. II) 2341 *et seq.*, also known as the Hobbs Act, sets forth procedures for judicial review of the orders of certain agencies, including the Interstate Commerce Commission. Section 2344 specifically provides (28 U.S.C. 2344):

> Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies.

Section 10327(i) of the Interstate Commerce Act (ICA) provides that in rail cases (49 U.S.C. 10327(i)):

> Notwithstanding this subtitle, an action of the Commission under this section and an action of a designated division under subsection (c) of this section is final on the date on which it is served, and a civil action to enforce, enjoin, suspend, or set aside the action may be filed after that date.

In the present case, respondents Brotherhood of Locomotive Engineers (BLE) and United Transportation Union (UTU) sought judicial review under the following circumstances:

> (i) On October 20, 1982, the Commission served an order approving a proposed consolidation of the Union Pacific, Missouri Pacific, and Western Pacific Railroads and providing related trackage rights to the Missouri-Kansas-Texas Railroad (MKT) and the Denver & Rio Grande Western Railroad (DRGW).[1]
>
> (ii) On April 4, 1983, BLE filed a "Petition for Clarification" requesting the Commission to clarify "its intent as to the crew manning or assignments of the trains to be operated by [MKT and DRGW]" under the Commission approved trackage rights (C.A. App. 2).

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[1] *Union Pacific Corp., Pacific Rail System, Inc. & Union Pacific R.R. – Control – Missouri Pacific Corp. & Missouri Pacific R.R.*, 366 I.C.C. 462 (1982).

(iii) On May 18, 1983, the Commission served a decision denying the petition, finding no need for clarification (Pet. App. 51a-54a).

(iv) On May 31, 1983, BLE filed a "Petition for Reconsideration" of the Commission's May 18, 1983 decision (C.A. App. 47-55), which was timely under the Commission's rules.[2]

(v) On June 7, 1983, UTU, which had not joined in BLE's petition for clarification, filed a "Petition for Reconsideration" (C.A. App. 71-84).

(vi) On October 25, 1983, the Commission served an order denying the petitions for reconsideration (Pet. App. 55a-68a).

BLE filed its petition for judicial review of the Commission's orders on December 16, 1983, and UTU filed a similar petition on December 23, 1983. The Commission urged the court of appeals to dismiss these petitions on the ground that they raised an untimely challenge to the Commission's October 20, 1982 decision. The court of appeals concluded that the petitions for judicial review were timely for purposes of reviewing the October 20, 1982 order because the unions "had no notice of their present claim until after ICC denied their [*sic*] petition for clarification and reconsideration thereof" (Pet. App. 12a). The court further stated (*id.* at 13a):

> Nor can it be claimed that the petition should be barred because it was not filed within 60 days after the May [1983] decision. For the Commission then undertook extensive review and issued a lengthy opinion in October [1983]. If the motion for reconsideration is filed within the statutorily prescribed

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[2] The Commission's appellate procedures permit the filing of a petition for reconsideration within 20 days after service of a Commission decision. See 49 C.F.R. 1115.3.

> review period, the time limitation tolls until the agency issues its final decision on the motion for reconsideration, *see Outland v. CAB*, 284 F.2d 224 (D.C. Cir. 1960); *Davis, supra,*[3] 735 F.2d at 1391 n.5, and it is tolled while the agency is giving full consideration to the issues presented for judicial review, *see Nat'l Insulation Transportation Committee v. ICC*, 683 F.2d 533, 543 n.17 (D.C. Cir. 1982).

Judge MacKinnon dissented from the majority's conclusion that the petitions for judicial review were timely for purposes of reviewing the Commission's October 20, 1982 order (Pet. App. 26a). He did not address whether the petitions should be time-barred because they were not filed within 60 days of the May 18, 1986 Commission order.

2. We maintain that the unions' petitions for judicial review were untimely for the purpose of reviewing the Commission's October 20, 1982 order. The petitions were timely for the purpose of reviewing the Commission's denial of BLE's petition for clarification, but the scope of the court of appeals' review should have been limited to whether the Commission abused its discretion in concluding that the October 20, 1982 consolidation decision "does not require clarification" (Pet. App. 53a). See Gov't Br. 22 n.16.

The Commission's decision denying BLE's petition for clarification was a final order for purposes of the Hobbs Act.[4] BLE was therefore required to seek judicial review

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[3] *National Bank of Davis v. Comptroller of the Currency*, 725 F.2d 1390 (D.C. Cir. 1984) (per curiam).

[4] The Commission's authority to entertain post-consolidation petitions for clarification derives from its general powers, under Section 10321, "in carrying out this subtitle" (49 U.S.C. 10321). See *ICC v. American Trucking Ass'ns*, 467 U.S. 354, 364-365 (1984); 49 C.F.R. 1117.1 (providing that the Commission may consider petitions for relief not otherwise covered by the Commission's rules). Notably, a petition for clarification, even if granted, could only explain, and

within 60 days of that decision. 28 U.S.C. 2344. However, under established D.C. Circuit and Commission practice, the filing of a petition for reconsideration generally postpones the running of the Hobbs Act's 60-day time limit. See *Pennsylvania* v. *ICC*, 590 F.2d 1187, 1192-1193 (D.C. Cir. 1978); *Montship Lines, Ltd.* v. *Federal Maritime Board*, 295 F.2d 147, 151 (D.C. Cir. 1961); *Outland* v. *CAB*, 284 F.2d 224, 227 (D.C. Cir. 1960); cf. *National Bank of Davis* v. *Comptroller of the Currency*, 725 F.2d at 1391-1392. This Court recognized that practice in *American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532 (1970), stating (*id.* at 541):

> Unless Congress provides otherwise, "[w]here a motion for rehearing is in fact filed there is no final action until the rehearing is denied." *Outland* v. *CAB*, 109 U.S. App. D.C. 90, 93, 284 F.2d 224, 227.

See *CAB* v. *Delta Air Lines, Inc.*, 367 U.S. 316, 326 (1961); see also *B.J. McAdams, Inc.* v. *ICC*, 551 F.2d 1112, 1114-1115 (8th Cir. 1977). Other circuits follow this practice. See, *e.g.*, *Texas* v. *United States*, No. 86-4430 (5th Cir. July 2, 1986) (reprinted as Addendum, *infra*, 1a-3a); *C.O.D.E., Inc.* v. *ICC*, 768 F.2d 1210, 1211-1212 (10th Cir. 1985); *Aeromar, C. Por A.* v. *Dep't of Transportation*, 767 F.2d 1491, 1493 (11th Cir. 1985); *Cities of Newark, New Castle & Seaford* v. *FERC*, 763 F.2d 533, 544-545 (3d Cir. 1985); *California Tribal Chair-*

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could not *modify*, the terms of a prior Commission order. The Commission's authority to modify its prior rail consolidation orders is limited by Section 10327(g), which conditions the reopening of a prior proceeding upon "material error, new evidence, or substantially changed circumstances" (49 U.S.C. 10327(g)) and by Section 11351, which provides that the Commission "may make appropriate orders supplemental to an order made in a proceeding under sections 11342-11345 and 11347 of this title" only when "cause exists" (49 U.S.C. 11351). See Gov't Br. 35 n.23.

man's Ass'n v. *United States Dep't of Labor*, 730 F.2d 1289, 1290-1291 (9th Cir. 1984); *Cartersville Elevator, Inc.* v. *ICC*, 724 F.2d 668, 672, aff'd en banc, 735 F.2d 1059, 1061 (8th Cir. 1984).[5]

Congress has not provided an exception from the general practice in the present case. Section 10327(i) does state that "an action of the Commission under this section * * * is final on the date on which it is served" (49 U.S.C. 10327(i)). The Commission's denial of BLE's petition for clarification is therefore final action in the sense that "a civil action * * * *may* be filed after that date" (*ibid.* (emphasis added)). Nevertheless, the Commission interprets the relevant statutes to provide that if an aggrieved party timely petitions the Commission to reconsider its otherwise "final" action, the commencement of the Hobbs Act's 60-day time limit will be delayed until the Commission has disposed of the petition.

This interpretation is consistent with the objectives of Section 10327(i). That Section's "final" action specification originated in Section 303 of the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act), Pub. L. No. 94-210, 90 Stat. 48-51, which added the finality

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[5] A different result obtains, of course, if the party fails to file its petition for administrative reconsideration within the time prescribed by statute or by the agency's rules, or if the party seeks other types of agency relief. For example, "[p]etitions to reopen, because they may be filed at any time after a final order, have not been permitted to toll the 60-day period for filing a petition for judicial review." *Cartersville Elevator, Inc.*, 724 F.2d at 672 (citing *Provisioners Frozen Express, Inc.* v. *ICC*, 536 F.2d 1303 (9th Cir. 1976)).

We also note that while some of these cases (*e.g.*, *C.O.D.E., Inc.*, 768 F.2d at 1212) discuss the issue in terms of "tolling" the 60-day review period, it is clear in each of the cases that the aggrieved parties were allowed a full 60-day time period, beginning from the Commission's denial of a petition for reconsideration, in which to file a petition for judicial review (see, *e.g.*, *id.* at 1211). Any other result would be unworkable in agency proceedings involving multiple parties.

provision as former Section 17(9)(h) of the ICA, 49 U.S.C. (1976 ed.) 17(9)(h). Congress enacted Section 303 as part of its general effort to streamline Commission proceedings. See S. Conf. Rep. 94-595, 94th Cong., 2d Sess. 136, 159-162 (1976); H.R. Rep. 94-725, 94th Cong., 1st Sess. 61-62, 105-107 (1975); S. Rep. 94-499, 94th Cong., 1st Sess. 60-62 (1975). Prior to the 4-R Act, the ICA *required* a party in a rail case to petition the Commission for reconsideration of an administrative order before seeking judicial review. See 49 U.S.C. (1970 ed.) 17(9). Congress, through the revisions contained in Section 303, enabled the party to by-pass that process and seek immediate judicial review. Nothing in Section 303's language or legislative history indicates, however, that Congress envisioned that a party *must* seek judicial review within 60 days of the Commission's decision, even though a petition for administrative reconsideration is pending.

The D.C. Circuit's decision in *Pennsylvania* v. *ICC*, *supra*, supports the Commission's interpretation. That case involved a challenge to the Commission's approval of a rail carrier's proposed tariff. The Commission's review was subject to procedures originating in Section 202(e)(2) of the 4-R Act, Pub. L. No. 94-210, 90 Stat. 37, which were codified in former Section 15(8)(a) of the ICA. See 49 U.S.C. (1976 ed.) 15(8)(a) (amended and recodified at 49 U.S.C. 10707). Former Section 15(8)(a) required the Commission to complete its hearings and issue a "final decision" on the lawfulness of the tariff not later than seven months after the tariff was scheduled to become effective (*ibid.*). The Commission issued a final decision and later rejected timely petitions for reconsideration (590 F.2d at 1190-1191). Interested parties then sought judicial review within 60 days of the denial of the petitions for reconsideration but more than 60 days after the "final decision," and the Commission attempted to dismiss the requests for judicial review as untimely (*id.* at 1191-1192). The court of appeals concluded that "to consider the

'final decisions' within 7 months required by § 15(8)(a) as entailing 'finality' for purposes of the Hobbs Act seems clearly mistaken" (590 F.2d at 1193). The court observed that the 4-R Act was intended to expedite Commission proceedings, but stated (*id.* at 1194):

> Administrative reconsideration is a more expeditious and efficient means of achieving an adjustment of agency policy than is resort to the federal courts, and it is hard to see why a Congress concerned to hasten the process of implementing new railroad tariffs would have wanted to restrict the availability of this avenue of appeal.

The D.C. Circuit's reasoning in *Pennsylvania* is fully applicable in this case. A requirement that parties to ICC rail carrier proceedings seek judicial review within 60 days of a Commission order, even if a petition for administrative reconsideration is pending, would discourage administrative resolution of disputes, increase the burdens on reviewing courts, and disrupt the process of orderly judicial review of agency action. See, *e.g.*, *B.J. McAdams, Inc.*, 551 F.2d at 1114-1115; cf. *United States* v. *Benmar Transport & Leasing Corp.*, 444 U.S. 4 (1979) (per curiam). We do not believe that Congress intended those results. Indeed, a refusal to postpone the commencement of the Hobbs Act time limit would be particularly incongruous in this case, where the Commission's denial of the petition for reconsideration contained an extensive elaboration of the basis for the Commission's original decision. Cf. *Bowman* v. *Loperena*, 311 U.S. 262 (1940).

It is therefore respectfully submitted that the unions' petitions for judicial review were timely for the purpose of reviewing the Commission's May 11, 1983 order denying BLE's petition for clarification.

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DECEMBER 1986

ADDENDUM

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-4430

STATE OF TEXAS, PETITIONER

v.

UNITED STATES OF AMERICA, AND
INTERSTATE COMMERCE COMMISSION, RESPONDENTS.

[Filed July 2, 1986]

On Petition for Review of Order of the Interstate Commerce Commission

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Before JOLLY, DAVIS and HILL, Circuit Judges.

BY THE COURT:

In this administrative matter, we must decide when a petition for review of an Interstate Commerce Commission decision should be filed with this court, when discretionary review of that decision has been sought before the ICC.

A subsidiary of Armstrong World Industries, Inc. hired Reeves Transportation to transport its products to its customers. Reeves brought carpet from Dalton, Georgia to a terminal facility in Arlington, Texas, deposited the carpet there under an ICC storage-in-transit order, and later shipped the carpet to points within Texas. The State of Texas decided that this second leg of the journey from the Arlington terminal to the final destination constituted intrastate commerce, and filed suit in state court alleging that Reeves did not have the permits required for intra-

state shipments under Texas law. In a parallel proceeding before the ICC, however, the ICC decided that the shipments constituted interstate commerce. Two unnamed parties have petitioned the ICC for discretionary review of that decision.

Texas petitioned for our review of the ICC decision at this time to avoid being precluded by the sixty-day statute of limitations for seeking judicial review of an ICC decision. 28 U.S.C. § 2344. Texas also sought to stay further proceedings in our court. Texas contends that it is unclear in the Fifth Circuit whether the sixty-day period will run from the date of the ICC decision or from the date of final disposition of the petition for discretionary review. Armstrong moves to intervene and argues that the appeal should not be stayed because the ICC can file a record and supplement that record as necessary.

The ICC, on the other hand, contends that Texas's petition for review should be dismissed without prejudice, basing its argument on the authority of cases from other circuits and on the need to avoid delay and forum shopping. *C.O.D.E., Inc. v. ICC*, 768 F.2d 1210, 1211 (10th Cir. 1985); *Cartersville Elevator, Inc. v. ICC*, 724 F.2d 668, 672 (8th Cir. 1984), *aff'd on reh'g* 735 F.2d 1059 (1985) (en banc); *B.J. McAdams, Inc. v. ICC*, 551 F.2d 1112, 1115 (8th Cir. 1977). No Fifth Circuit case appears to have considered this precise question.

We hold that the sixty-day period runs from the date the ICC enters its final disposition of the petition for discretionary review. This holding promotes judicial economy, since it avoids the filing of petitions for review, such as Texas' here, merely to avoid being precluded. Furthermore, subsequent ICC action on petitions for discretionary review may possibly make any action by an appellate court unnecessary.

IT IS THEREFORE ORDERED that the motion of the petitioner to stay further proceedings in the court of appeals is DENIED.

IT IS FURTHER ORDERED that the motion of Armstrong World Industries, Inc., to intervene is DENIED.

IT IS FURTHER ORDERED that the motion of the respondents to dismiss without prejudice to the petitioner's right to file a petition for review within sixty days after entry of the ICC's decision disposing of the pending petitions for reconsideration is GRANTED. Furthermore, the ICC should advise the petitioner and all other parties to its proceedings when the petitions for reconsideration are ruled upon.

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No. 85-793

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
Petitioner,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND UNITED TRANSPORTATION UNION,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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ARGUMENT

The Court, by order entered December 1, 1986, has invited supplemental briefs addressing the question whether the United States Court of Appeals for the District of Columbia Circuit had jurisdiction of the unions' petitions for review of the Interstate Commerce Commission's order of May 18, 1983 (denying the petition for clarification of respondent Brotherhood of Locomotive Engineers ("BLE")) in view of 28 U.S.C. § 2344, 49 U.S.C. § 10327(i) and the passage of more than 60 days from service of the May 18 order and the filing of the petitions for review in the Court of Appeals.

Petitioner Missouri-Kansas-Texas Railroad Company ("MKT") and respondents Union Pacific Railroad Company ("UP") and Missouri Pacific Railroad Company ("MP") respectfully submit that the court of appeals did *not* have jurisdiction to review the May 18, 1983 order of the Interstate Commerce Commission ("ICC" or "Commission").

I. The Relevant Jurisdictional Statutes Provide That Petitions For Review Filed More Than 60 Days Following May 18, 1983, Could Not Properly Bring Before The Court Of Appeals The ICC Order Served On That Date.

A. Relevant Statutes

The Administrative Orders Review Act (the "Hobbs Act"), 28 U.S.C. § 2344, requires that, for jurisdiction to vest in a competent court, the petition seeking review must be filed within 60 days of the entry of the final order of which review is sought:

> On the *entry* of a *final order* reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the *final order may*, within 60 days after its entry,

> file a petition to review the order in the court of appeals where venue lies.

28 U.S.C. § 2344 (emphasis added).

The provision of the Interstate Commerce Act addressing "Commission action and appellate procedure in rail carrier proceedings" provides:

> (i) Notwithstanding this subtitle, an action of the Commission under this section . . . *is final on the date on which it is served*, and a civil action to enforce, enjoin, suspend or set aside the action may be filed after that date.

49 U.S.C. § 10327(i) (emphasis added).

B. Application To This Case

The order denying BLE's petition for clarification was served on May 18, 1983. It became final on that date pursuant to 49 U.S.C. § 10327(i). The 60 day limitations period commenced on that date pursuant to 28 U.S.C. § 2344 and expired on July 17, 1983. The BLE and the United Transportation Union ("UTU") did not file petitions for review until five months later (on December 16 and December 23 respectively).

The Hobbs Act is jurisdictional in nature. As the D.C. Circuit had itself previously held: "It is beyond cavil that these limitations are jurisdictional." *Microwave Communications, Inc. v. FCC*, 515 F.2d 385, 389 (D.C. Cir. 1974); *accord Texas v. United States*, 749 F.2d 1144, 1146 (5th Cir.), *cert. denied*, 105 S. Ct. 3513 (1985); *Cartersville Elevator, Inc. v. ICC*, 724 F.2d 668, 672 (8th Cir.), *aff'd en banc*, 735 F.2d 1059 (8th Cir. 1984); *Illinois Central Gulf R.R. v. ICC*, 720 F.2d 958, 960 (7th Cir. 1983); *Pennsylvania v. ICC*, 590 F.2d 1187, 1193 (D.C. Cir. 1978).[1]

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[1] Furthermore, Rule 26 of the Federal Rules of Appellate Procedure denies to the reviewing court the authority to "enlarge the time pre-

On the face of the statutes,[2] therefore, "it is beyond cavil" that the court of appeals could have no jurisdiction to entertain petitions for review once the 60th day following May 18, 1983, had passed (or after July 17, 1983).

II. The Legislative History Of The 4-R Act Supports The Unambiguous Language Of The Jurisdictional Provisions.

Section 10327(i) was originally adopted as part of the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act"), Pub. L. No. 94-210, 90 Stat. 31 (1976).

Section 303 of the 4-R Act, 90 Stat. 48 (later codified as 49 U.S.C. § 10327) established a new statutory regime for Commission practice and procedure, including appellate procedure. The pertinent Senate report[3] sets forth both the general purposes of the new procedures and the import of specific provisions:

> Not only is there a need to change the substantive standards by which the Commission regulates railroads, but to improve the regulatory

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scribed by law for filing a petition to enjoin, set aside, suspend, modify, enforce or otherwise review, or a notice of appeal from, an order of an administrative agency, board, commission or officer of the United States." Fed. R. App. P. 26(b).

[2] During oral argument, counsel for the ICC suggested that the word "may" in 49 U.S.C. § 10327(i) rendered that provision somehow permissive or advisory. Of course, the diction in the Hobbs Act is, in this respect, identical. The use of the word "may" therein does not render the Hobbs Act limitations period any less mandatory and jurisdictional. The word obviously means that an aggrieved party may, or may not, seek review at all. It does not mean that a party may seek review within the prescribed period or that it may do so at some later date.

[3] The regulatory reform section was originally adopted by the Senate, in S. 2718, on December 4, 1975. S. 2718, 94th Cong., 1st Sess., 121 Cong. Rec. 38492 (1975). Although various modifications occurred during the ensuing legislative process, the "final order" provision of S. 2718 remained intact; hence, the Senate report on S. 2718 is authoritative.

> process. There are presently grave limitations upon the ability of the Commission to properly perform its regulatory functions. There are presently restrictions upon the effective date of Commission orders which prohibit prompt responses to emergencies, guarantees of "administrative due process" which often add nothing to the quality of the record on which the Commission must base its decisions but which add greatly and unnecessarily to the length of Commission proceedings, and inflexible general proceeding rules which do not easily adjust to the nature of particular proceedings. These all add up to excessive regulatory delay and erode the confidence of the public in needed regulation. This bill attempts to ease these problems by revising Commission procedures in both specific and general cases to help expedite the regulatory process.

S. Rep. No. 499, 94th Cong., 1st Sess. 1, 15 (1975), *reprinted in* 1976 U.S. Code Cong. & Ad. News 14, 29.

In the section-by-section analysis pertinent to the provision in issue here, the report explained:

> This section expedites Commission procedures by modifying section 17, which contains procedural requirements affecting all formal Commission proceedings. Four subsections of this section (17(5)-17(9)) are substantially rewritten. These subsections were enacted in their present form by the Transportation Act of 1940, and with the exception of the last sentence of subsection 17(5) (added in 1961), this section remains the same today. Since 1940, administrative proceedings have grown increasingly complex. In 1947, the Administrative Procedure Act was enacted and now controls the procedures of most government agencies. However, section 17 continues to gov-

> ern ICC procedures, and since its requirements are in several respects considerably more extensive than those contained in the APA, *section 17 in its present form has contributed substantially to unnecessary regulatory lag.*
>
> . . . .
>
> *Section 205 provides for procedural reforms which will expedite Commission proceedings and reduce regulatory lag.*

Id. at 60, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 75 (emphasis added).

Floor debate was somewhat sparse, but the comments of the legislation's proponents similarly reflect Congress' intent to bring expedition and finality to rail carrier proceedings. In support of the original Senate bill, Senator Beall offered the following comment on regulatory reform:

> Title I, II and IV reform the regulatory agency, the Interstate Commerce Commission. One example is the streamlining of railroad mergers and rationalizations in order to avoid situations like the Rock Island case which dragged out for over a decade.

121 Cong. Rec. 38446 (1975). *Accord id.* at 42208 (remarks of Senator Beall, a conferee, in support of Conference Committee bill).

In the House, Representative Rooney, Chairman of the Subcommittee on Transportation and Commerce, urged support of the final Conference bill (which included the final order language of S. 2718), stating:

> The second area of this reform addresses the Interstate Commerce Commission which is our oldest, and many think our slowest agency. The bill places strict time limits on procedures so we do not have 12-year mergers like the Rock Island

> that eventually fail; so that we do not have procedures so cumbersome and time lags so great that they cost the rail industry billions of dollars and bring the railroads to collective bankruptcy.

122 Cong. Rec. 1352 (1976).

The legislative history of the 4-R Act, as demonstrated by congressional reports and congressional debate, thus reveals a general legislative purpose to reform the regulatory procedures of the ICC in an effort to eliminate harmful regulatory lag. The purpose of those provisions was to speed up ICC processes by streamlining ICC procedures and by defining specific time-limits for ICC actions.

Therefore, the legislative history of section 10327(i) confirms that the statute means what it says—that a Commission action is final when served. Only by honoring the plain meaning of section 10327(i) can the purpose and intent of the legislature, bringing expedition and finality to ICC procedures, be accomplished.

III. Analogous Case Law Likewise Supports The Unambiguous Language Of The Jurisdictional Statutes.

We have found no judicial decisions authoritatively construing 49 U.S.C. § 10327(i). However, a decision of the United States Court of Appeals for the Tenth Circuit, addressing the limitations period established by the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136(a)-136(y), holds that its 60-day period for seeking review is conclusive and is not tolled by the filing of a petition for reconsideration. *Selco Supply Co. v. EPA*, 632 F.2d 863 (10th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981). The FIFRA provision, 7 U.S.C. § 136n(b), is much less stringently worded than the 4-R Act provision in issue here. It does not, for example, contain the finality declaration set forth in 49 U.S.C. § 10327(i)

and more closely resembles the Hobbs Act's more general provision.[4] Nevertheless, the *Selco* court held:

> The grant of exclusive jurisdiction in the court of appeals is intended to ensure prompt resolution of the validity of EPA orders. . . . The time limits for judicial review of actions taken under environmental protection statutes provide a statute of limitations which bars late filings.

632 F.2d at 865 (citations omitted).

The congressional mandate for finality, expedition and the elimination of regulatory lag in the 4-R Act is surely no less forceful than similar policies underlying the environmental laws. The *Selco* court noted petitioner's argument that EPA regulations provided for petitions for reconsideration (as do the ICC's regulations), but said:

> The difficulty is that the statute, 7 U.S.C. § 136n(b) requires that a petition for judicial review be filed within 60 days after the entry of the order, and contains no provision for tolling by a motion for reconsideration. Federal courts may exercise only that judicial power provided by the Constitution and conferred by Congress.

Id. (citations omitted). The *Selco* court also cited "[d]ecisions under other federal statutes permitting tolling of the limitation period," but characterized those decisions as "not pertinent" to the statute it was construing. *Id.* (citing, *inter alia, B. J. McAdams, Inc. v. ICC*, 551 F.2d 1112, 1114 (8th Cir. 1977), dealing with the Interstate Commerce Act). Neither *McAdams* nor the other cases are pertinent here either. *McAdams*, a decision reviewing the ICC's regulation of motor carriers, had nothing to do with

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[4] The court characterized the statute as requiring the filing of a petition within 60 days even though the statute also used the word "may." *See supra* note 2.

the 4-R Act special provision relating to "[C]ommission action and appellate procedure in rail carrier proceedings." 49 U.S.C. § 10327.

Similarily, none of the cases proffered by the ICC in its supplementary submission to this Court[5] implicated 49 U.S.C. § 10327(i), and neither of the two decisions of this Court invoked by the ICC is apposite. *Bowman v. Loperena*, 311 U.S. 262 (1940), was a bankruptcy case that did not even involve the Hobbs Act, much less the 4-R Act. *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532 (1970), which at least involved the review of an ICC order (but did not involve a rail carrier proceeding and antedated the 4-R Act), dealt with an entirely different issue: whether the filing of an action seeking judicial review of an ICC order disabled the Commission from granting a timely filed petition for rehearing.

The only conceivable relevance of *American Farm Lines* is the majority's citation with approval of *Outland v. CAB*, 284 F.2d 224 (D.C. Cir. 1960), as follows:

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[5] Letter dated November 14, 1986 of Henri F. Rush, Deputy General Counsel ICC. We would have no quarrel with the ICC's submission if it had included one qualification (shown in brackets in this quotation from Mr. Rush's letter):

> [A] timely petition may, where. . . the agency does then consider on the merits the matter on which reconsideration has been sought [and does alter its prior decision on reconsideration], cause the running of the time to petition for review to begin after such reconsideration. . . .

As the D.C. Circuit held in *Microwave*:

> It has long been settled that an order which merely denies rehearing of another order is not itself reviewable.

515 F.2d at 387 n.7. The fact that the ICC may have thought about the merits, or discoursed on them at length in an opinion accompanying an order totally denying reconsideration, cannot alter the character of that ultimate order.

> *Unless Congress provides otherwise,* "[w]here a motion for rehearing is in fact filed there is *no final action* until the rehearing is denied." [Citing *Outland*].

397 U.S. at 541 (brackets in original, emphasis added).

The mere citation of the Court's statement, however, begs the question, which is: Has Congress provided otherwise? We submit that section 10327(i) does provide otherwise; it states in unequivocal terms that there *is* "final action" upon the service of the original order.

As noted, none of the other cases cited by the ICC were decided under this provision of the 4-R Act. Even those cases, however, show that the inquiry always turns on the intent of Congress, which is the fount of federal court jurisdiction. Thus, while the Tenth Circuit applied the rule sought by the ICC in one case that it cites, *C.O.D.E., Inc. v. ICC*, 768 F.2d 1210 (10th Cir. 1985), it expressly disclaimed any principle of universal applicability, noting that it had previously declined to apply such reasoning in *Selco*. *Id.* at 1212. The Tenth Circuit recognized that Congress deemed finality and expedition important in cases arising under the environmental laws—just as Congress in the 4-R Act deemed finality and expedition important in railroad reorganization cases.

Additionally, even though the courts of appeals cases cited by the ICC are not on point because they involve either different statutes or different provisions of the Interstate Commerce Act, their rationale may not properly be applied to this case. They are all progeny of the *Outland* holding that, in pursuit of the laudable goals of judicial economy and efficiency, there could be no "final action" until the agency determined any pending petitions for rehearing or reconsideration. 284 F.2d at 227-28. The flaw in applying that reasoning here is that the power to establish federal court jurisdiction is entrusted by the Constitution of the United States to the Congress. The courts

may not create their own jurisdiction, whether to achieve judicial economy and efficiency, or for any other purpose, however praiseworthy.[6]

Finally, we note that the same Court of Appeals that improperly accepted jurisdiction of this case has "previously admonished petitioners of the wisdom of filing protective petitions for review during the statutory period." *Eagle-Picher Industries v. EPA*, 759 F.2d 905, 912 (D.C. Cir. 1985). The unions here disregarded that advice, failing to file their petitions until approximately seven months after the order under review became final.

CONCLUSION

For the foregoing reasons, petitioner MKT and respondents UP and MP respectfully submit that this Court should reverse the decision below and remand to the Court of Appeals with instructions to vacate its opinion below and dismiss the petitions for lack of jurisdiction.

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[6] We note also that no impediments to judicial economy and efficiency are created by the provisions of the Hobbs Act and the 4-R Act at issue here. As appears in the record below, the D.C. Circuit requires, in all administrative agency review proceedings, a Docketing Statement that inquires, *inter alia*: "Is a request for rehearing or reconsideration pending at the agency." Thus informed, the court can, if it chooses, delay action on a timely filed petition for review to permit the Commission to cure any alleged defects in its order.

Respectfully submitted,

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